DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-448
Title: Bridget Hardt, Petitioner
v.
Reliance Standard Life Insurance Company
Docketed: October 15, 2009
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Nos.: (08-1896)
Decision Date: July 14, 2009
Rehearing Denied: August 10, 2009
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Oct 14 2009	Petition for a writ of certiorari filed. (Response due November 16, 2009)
Oct 26 2009	Waiver of right of respondent Reliance Standard Life Insurance Company to respond filed.
Nov 9 2009	DISTRIBUTED for Conference of November 24, 2009.
Nov 17 2009	Response Requested . (Due December 17, 2009)
Dec 16 2009	Brief of respondent Reliance Standard Life Insurance Company in opposition filed.
Dec 29 2009	Reply of petitioner Bridget Hardt filed.
Dec 30 2009	DISTRIBUTED for Conference of January 15, 2010.
Jan 15 2010	Petition GRANTED. The brief of petitioner is to be filed on or before Thursday, February 25, 2010. The brief of respondent is to be filed on or before Thursday, March 25, 2010. A reply brief, if any, is to be filed in accordance with Rule 25.3 of the Rules of this Court.
Feb 16 2010	SET FOR ARGUMENT ON Monday, April 26, 2010.
Feb 24 2010	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the respondent.
Feb 25 2010	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the petitioner.
Feb 25 2010	Brief of petitioner Bridget Hardt filed.
Feb 25 2010	Joint appendix filed. (Statement of costs filed)
Mar 4 2010	Brief amicus curiae of United States filed.
Mar 4 2010	Brief amicus curiae of United Policyholders filed.
Mar 4 2010	Brief amici curiae of AARP and National Employment Lawyers Association filed.

Mar 5 2010	Record received from U.S.C.A. for 4th Circuit. (1 envelope)
Mar 18 2010	CIRCULATED.
Mar 24 2010	Brief of respondent Reliance Standard Life Insurance Company filed. (Distributed)
Mar 31 2010	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 31 2010	Brief amicus curiae of DRI - The Voice of the Defense Bar filed. (Distributed)
Apr 16 2010	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 19 2010	Reply of petitioner Bridget Hardt filed. (Distributed)
Apr 26 2010	Argued. For petitioner: John R. Ates, Alexandria, VA.; and Pratik A. Shah, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Nicholas Q. Rosenkranz, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

No. 09-448

Supreme Court, U.S.
FILED
OCT 14 2009
OFFICE OF THE CLERK
William K. Suter, Clerk

In The
Supreme Court of the United States

BRIDGET HARDT,

Petitioner,

v.

RELIANCE STANDARD LIFE INSURANCE COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 502(g)(1) of the Employee Retirement Income Security Act of 1974 (ERISA) provides: "In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of the action to either party." 29 U.S.C. § 1132(g)(1).

The Fourth Circuit in the decision below held that "only a prevailing party is entitled to consideration for attorneys' fees in an ERISA action," while the Second, Fifth and Eleventh Circuits have declined to read a "prevailing party" requirement into § 502(g)(1) and other circuits have issued conflicting authority. The Fourth Circuit also held that the "prevailing party" standard was not met and vacated an award of attorneys' fees to petitioner, even where the district court found "compelling evidence that [petitioner] is totally disabled," ruled that petitioner "did not get the kind of review to which she was entitled under applicable law" and remanded for a redetermination of benefits with an instruction that respondents "act on [petitioner's] application by adequately considering all the evidence discussed within this Opinion within thirty (30) days of its date of issuance" or "judgment will be issued in favor of [petitioner]" and petitioner obtained the requested long-term disability benefits upon remand.

The questions presented are:

1. Whether the Fourth Circuit erred in holding that ERISA § 502(g)(1) provides a district court discretion to award reasonable attorney's fees only to a prevailing party?

2. Whether a party is entitled to attorney's fees pursuant to § 502(g)(1) when she persuades a district court that a violation of ERISA has occurred, successfully secures a judicially-ordered remand requiring a redetermination of entitlement to benefits and subsequently receives the benefits sought on remand?

RULE 14.1(b) STATEMENT

The parties are as stated in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bridget Hardt respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The district court opinion finding "compelling evidence that [petitioner] is totally disabled," ruling that petitioner "did not get the kind of review to which she was entitled under applicable law," and remanding for a redetermination of benefits with an instruction for the plan administrator to "adequately consider[] all the evidence discussed within this Opinion within thirty (30) days of its date of issuance" or "judgment will be issued in favor of [petitioner]" was reported at 540 F. Supp. 2d 656 (E.D. Va. 2008) and is reproduced in the Appendix (App. 31a-49a). The district court's subsequent order awarding attorneys' fees and costs and entering judgment in favor of petitioner is unreported (App. 12a-30a). The opinion of the court of appeals (App. 1a-11a) is unreported, but may be found at 2009 U.S. App. LEXIS 15478.

JURISDICTION

The court of appeals issued its opinion and entered judgment on July 14, 2009. It denied rehearing and rehearing en banc by order entered August 10, 2009. This petition is filed within ninety days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 502(g) of ERISA (29 U.S.C. § 1132(g)) is reproduced in the Appendix (App. 51a-52a).

STATEMENT OF THE CASE

1. In enacting ERISA, Congress determined "that the continued well-being and security of millions of employees and their dependents are directly affected by" employee benefit plans. § 2, as codified at 29 U.S.C. § 1001(a). ERISA governs employee welfare benefit plans that, "through the purchase of insurance or otherwise," provide medical, surgical, or hospital care, or benefits in the event of sickness, accident, disability, or death. § 3(1), 29 U.S.C. § 1002(1).

A fundamental policy of ERISA is "to protect . . . participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." § 2, as codified at 29 U.S.C. § 1001(b). To further this policy, Congress specifically allowed for attorney's fees to encourage participants and others to bring suit when warranted: "In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of the action to either party." § 502(g), as currently codified at 29 U.S.C. § 1132(g)(1). (Congress in 1980 added a separate provision to Section 502(g) to

require an award of attorney's fees and costs in cases by fiduciaries to recover delinquent contributions in which judgment in favor of the plan is granted. *See* Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, § 306(b), 94 Stat. 1208, 1295 (1980), as codified at 29 U.S.C. § 1132(g)(2) ("In any action under this title by a fiduciary or on behalf of a plan to enforce section 515 in which a judgment in favor of the plan is awarded, the court shall award the plan" specified relief, including "reasonable attorney's fees and costs of the action, to be paid by the defendant")).

2. Dan River Inc. is a textile manufacturer that provides benefits to qualified participants in its Group Long-Term Disability Insurance Program Plan (the Plan). App. 31a. Dan River administers the Plan, and Reliance Standard Life Insurance Company (Reliance) both decides whether a claimant is entitled to benefits and pays for such benefits. *Id.* at 32a.

Petitioner Hardt served as an administrative assistant to the President of Dan River. *Id.* In 2000, Hardt began experiencing pain in her neck and shoulders. Physicians diagnosed her as suffering from carpal tunnel syndrome (CTS). *Id.* Despite surgery on both of her wrists, Hardt still experienced pain, and she stopped working on January 23, 2003. *Id.*

Hardt subsequently requested that Reliance pay her long-term disability (LTD) benefits pursuant to the Plan, explaining in her claim form that she suffered from numbness, tingling, loss of feeling, and extreme pain in her arms, hands, shoulders, and

neck. *Id.* Reliance provisionally approved Hardt's claim for LTD benefits and required her to submit to a functional capacities evaluation ("FCE"). *Id.*

Hardt participated in an FCE in October 2003, which was limited to assessing the impact of Hardt's CTS and neck pain on her ability to work. *Id.* The evaluator summarized Hardt's pertinent medical history and found that Hardt suffered from major limitations in several areas, but nonetheless concluded that Hardt could perform sedentary work and lift 4 to 5 pounds on occasion with her right hand, and 2 to 3 pounds on a frequent basis. *Id.* at 32a-33a.

Based on the results of this FCE, Reliance denied Hardt LTD benefits in December 2003, concluding that she did not meet the Plan's definition of total disability. *Id.* at 33a. Hardt filed an administrative appeal, and Reliance partially reversed its decision, agreeing to provide Hardt LTD benefits for twenty-four months based on her inability to perform her current position. *Id.*

Meanwhile, one of Hardt's treating physicians diagnosed her as suffering from a separate condition – hereditary small-fiber neuropathy, which is a disorder involving small sensory cutaneous nerves with symptoms including tingling, numbness, burning pain or extreme coldness, brief, painful sensations, and loss of temperature sensation. *Id.* The physician found, *inter alia*, that that Hardt's motor skills were limited by pain. *Id.* Despite increases in prescribed pain medication, Hardt "continued to have obvious pain," which became worse over the following months. *Id.* at 34a. The

neuropathy caused Hardt a "burning sensation in the feet all the way to the ankles[,] pain and cramping to the upper 1/3 of her calves," and swollen feet, making walking difficult. *Id.* at 34a-35a. (punctuation altered).

Hardt then applied to the Social Security Administration ("SSA") for disability insurance benefits and submitted questionnaires completed by two of her treating physicians. *Id.* at 35a. One concluded Hardt could not return to gainful employment in her prior position or other sedentary positions because of her neuropathy and other ailments. *Id.* The physician also observed that Hardt would experience "pain or other symptoms severe enough to interfere with attention and concentration . . . [c]onstantly," and that she had limitations on her ability to walk, sit, or stand due to her impairments. *Id.* The second treating physician concluded that Hardt would have difficulty working at a regular job on a sustained basis. *Id.* He noted, among other things, that Hardt's disability placed limitations on her ability to walk, sit, and stand and that she experienced "pain or other symptoms severe enough to interfere with attention and concentration . . . frequently." *Id.* Both doctors found that Hardt was not a malingerer. *Id.* The SSA determined that Hardt was "disabled" under the Social Security Act because it was "impossible for her to return to her former employment or make an adjustment to perform other work." *Id.* at 35a-36a.

A few months after Hardt received Social Security disability benefits, Reliance notified her that it would terminate her LTD benefits at the end of the twenty-four month period. *Id.* at 36a. The Plan

provided LTD benefits after twenty-four months only if she was totally disabled from all occupations. *Id.* Reliance found that Hardt was not totally disabled due to her CTS and noted that the FCE conducted in 2003 demonstrated that she had sedentary restrictions, but that she could perform a sedentary job. *Id.*

Hardt filed an administrative appeal regarding the termination of her LTD benefits. *Id.* In support of her claim, Hardt submitted all of her medical records, the SSA questionnaires completed by her treating physicians, and an updated questionnaire from one physician that again determined Hardt would be unable to maintain a job. *Id.*

Before ruling on the appeal, Reliance decided to obtain an updated FCE. *Id.* Although Reliance knew Hardt had been diagnosed with neuropathy, Reliance did not request that the testing company review Hardt for neuropathy or neuropathic pain; instead, the FCE was limited to determine whether Hardt had CTS or neck pain. *See id.* at 36a.

Hardt appeared for two separate FCEs, but the results of both were considered invalid because the examiners believed Hardt's effort was submaximal. *Id.* at 37a. One examiner noted that Hardt "refused multiple tests . . . for fear of nausea/illness/further pain complaints," but Reliance did not mention neuropathy or neuropathic pain in its referral request to the testing company. *Id.*

Rather than have a doctor personally examine Hardt, Reliance hired a doctor to review some, but not all, of her medical records. *Id.* The doctor

ultimately concluded in his peer review report that Hardt's health was expected to improve, yet the report failed to address any of the pain medications prescribed to Hardt, the effect her pain had on her ability to work, or the treating physicians' questionnaires finding that Hardt was completely disabled. *Id.* at 37a-38a. Reliance also retained a vocational rehabilitation counselor to determine what jobs, if any, Hardt could perform. *Id.* at 38a. The labor market study identified eight employment opportunities for Hardt, but the study was based on an evaluation of Hardt's health in 2003. *Id.*

On March 27, 2006, Reliance notified Hardt that it would not change its decision to terminate her LTD benefits, basing its decision on the FCEs, the peer review report, and the labor market study. *Id.*

3. Hardt exhausted her administrative appeals and then filed suit in the United States District Court for the Eastern District of Virginia, which had jurisdiction pursuant to ERISA § 502(e) (29 U.S.C. § 1132(e)) and 28 U.S.C. § 1331.

On March 27, 2008, the court issued an Opinion and Order based upon the parties' cross motions for summary judgment. App. 31a-49a. The court denied Reliance's motion for summary judgment, stating that "it is clear that Reliance's decision to deny [] Hardt long-term disability benefits was not based on substantial evidence." *Id.* at 47a.

With regard to Hardt's motion for summary judgment, the district court found "compelling evidence that [] Hardt is totally disabled due to her neuropathy" and that "the record indicates that []

Hardt did not get the kind of review to which she was entitled under applicable law." *Id.* at 48a. The district court remanded the case to Reliance "to fully and adequately assess [] Hardt's claim." *Id.* The district court clearly indicated that that Hardt would prevail if the Plan did not abide by the court's instruction to consider all the medical evidence. *Id.* at 49a. (specifically instructing Reliance to act on Hardt's application by "adequately considering all the evidence discussed within this Opinion within thirty (30) days of its date of issuance. Otherwise, judgment will be issued in favor of [] Hardt.").

Reliance found Hardt eligible for benefits after this judicially-ordered remand. *Id.* at 13a.

The district court then granted Hardt's motion for attorney's fees and costs pursuant to ERISA § 502(g)(1). *Id.* at 30a. Recognizing prior Fourth Circuit precedent requiring prevailing party status before fees and costs could issue under § 502(g)(1), the district court found that "the court sanctioned a material change in the legal relationship of the parties by ordering the defendant to conduct the type of review to which the plaintiff was entitled" and thus "[i]n light of the fact that, on remand, the plaintiff received precisely the benefits she had sought, she meets the definition of a 'prevailing party' and is eligible for an award of attorneys' fees." *Id.* at 22a.

The district court next evaluated whether attorneys' fees were justified under an established five-factor test used to guide the court's discretion. *Id.* at 22a-25a. These factors are: (1) the degree of

opposing parties' culpability or bad faith; (2) ability of opposing parties to satisfy an award of attorneys' fees, (3) whether an award of attorneys' fees against the opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions. *Id.* at 16a-17a.[1]

In regard to the degree of bad faith or culpability factor, the district court found that:

> the record is replete with instances of [Reliance's] staunch opposition to awarding any benefits to [Hardt]. . . . the totality of circumstances seems to

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[1] Nearly all courts of appeals, including the Fourth Circuit, have used this five-factor test to determine when fees should be awarded. *See Quesinberry v. Life Ins. Co. of N. America*, 987 F.2d 1017, 1028-29 (4th Cir. 1993) (en banc); *see also Eddy v. Colonial Life Ins. Co. of Am.*, 59 F.3d 201, 206-07 (D.C. Cir. 1995); *Gray v. New Eng. Tel. & Tel. Co.*, 792 F.2d 251, 257-258 (1st Cir. 1986), and cases cited therein from Second, Third, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits adopting test; *Sec. of Dept. of Labor v. King*, 775 F.2d 666, 669 (6th Cir. 1985). The Seventh Circuit has used two tests to determine whether fee awards in ERISA actions are justified. *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574, 592-93 (7th Cir. 2000) (describing five-factor test and "substantially justified" test). The Seventh Circuit does not consider these different tests as having significant practical consequences. *See id.*

Regardless, the issues in this case are limited to whether an award of attorney's fees should issue only to a prevailing party and, if so, whether a remand for reconsideration of benefits in these circumstances meets a prevailing party test for purposes of § 502(g)(1).

> indicate that it was [Reliance's] goal from the beginning to deny [Hardt] the benefits she had claimed, and that, to further that goal, [Reliance] engaged in only the most cursory review of the medical evidence. With the (not insignificant) exception of actually awarding her benefits on remand, [Reliance] has opposed [Hardt's] position throughout the course of this litigation. And even when [Reliance] did award [Hardt] the benefits she sought, it was only after having been ordered by the court to provide the kind of meaningful review of the evidence to which [Hardt] was entitled by law. Thus, the bad faith and culpability of [Reliance] in ignoring the medical evidence of [Hardt's] disability weigh in favor of an award of attorneys' fees to [Hardt].

Id. at 22a-23a. In regard to the second and third factors, the district court found that Reliance could pay an award of attorneys' fees and that an award of fees in this case "would deter similarly-situated defendants from failing to consider the full breadth of medical evidence available to them when reviewing a claim for benefits." *Id.* at 23a-24a. The court found that the fourth factor (the amount of benefit the action conferred on members of the plan) weighed against awarding fees. *Id.* at 24a. It held as to the fifth factor (relative merits of the parties' positions) that Hardt's "position clearly has the higher relative merit, as demonstrated in the court's remand order and–more importantly–the ultimate

resolution of the case" and that this factor weighed in favor of granting fees to Hardt. *Id.* at 24a-25a (noting, in addition, that the court had found that "Reliance's decision to deny [] Hardt long-term disability benefits was not based on substantial evidence"). Based on the five-factor test and the totality of the circumstances of the case, the district court determined to exercise its discretion and award fees and costs to Hardt. *Id.* at 25a.

After reviewing the reasonableness of the fees and costs requested, the district court awarded Hardt reduced attorneys' fees and costs and issued judgment in her favor. *Id.* at 29a-30a.

4. Reliance appealed the award of attorneys' fees and costs to the Fourth Circuit. Reliance limited its appeal to a single question: "Is Ms. Hardt a 'prevailing party?'" Fourth Circuit Case No. 08-1896, Appeal Docket 15, p.18 (Brief of Appellant, at p.11). *See also, id.*, Appeal Docket 21, p.5 (Reply Brief of Appellant at p.1) ("The single question before this Court is whether Ms. Hardt can be considered a 'prevailing party' as required under the ERISA fee-shifting statute when there is no judgment on the merits in her favor and there is no consent decree."). Reliance did not appeal the district court's use or application of the five-factor test.

The Fourth Circuit, with jurisdiction pursuant to 28 U.S.C. § 1291, vacated the district court's judgment and award of attorneys' fees. App. 1a-11a. In so ruling, the Fourth Circuit first discussed its established requirement for awarding fees in ERISA cases:

> It is well settled that "only a prevailing party is entitled to consideration for attorneys' fees in an ERISA action." *Martin v. Blue Cross & Blue Shield of Va., Inc.*, 115 F.3d 1201, 1210 (4th Cir. 1997). To be a prevailing party, "a plaintiff [must] receive at least some relief on the merits of his [or her] claim." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001)). "[E]ven an award of nominal damages suffices under this test." *Id.* at 604. The Supreme Court has, however, established a bright-line boundary on what constitutes "relief on the merits" of a particular claim: only "enforceable judgments on the merits and court-ordered consent decrees create the material alteration of the legal relationship of the parties necessary to permit an award of attorney's fees." *Buckhannon*, 532 U.S. at 604 (internal quotation marks omitted).

Id. at 7a-8a (brackets in original).

The Fourth Circuit then examined whether Petitioner met the Fourth Circuit's post-*Buckhannon* prevailing party test. The Fourth Circuit reviewed its decision in *Goldstein v. Moatz*, 445 F.3d 747, 751 (4th Cir. 2006), in which the court acknowledged it "clarified [the] *Buckhannon* standard by holding that there is no exception for 'tactical mooting' – the situation where a defendant chooses to settle rather

than risk an award of attorney's fees." *Id.* at 8a. The court then noted that *Goldstein* "left open the question of whether there is an exception to the *Buckhannon* rule where a defendant has agreed to provide the relief requested in response to an affirmative indication by the presiding court that the plaintiff is about to prevail." *Id.* at 8a-9a (internal punctuation omitted).

The Fourth Circuit ultimately concluded that petitioner's case was a "tactical mooting" case and that she did not meet the court's prevailing party test. As the Fourth Circuit saw it, the district court's findings that petitioner is totally disabled and that she did not get the kind of review to which she was entitled under applicable law, coupled with its remand order for the Plan to re-determine whether petitioner qualified for benefits under threat of judgment being entered in favor of petitioner were "simply insufficient to overcome the statutory requirement that a party applying for a fees and costs award must first have been accorded some relief in the district court." *Id.* at 10a (quoting *Goldstein*, 445 F.3d at 752). The Fourth Circuit held that because the district court remand "did not require Reliance to award benefits" the order does not "constitute an 'enforceable judgment[] on the merits' as *Buckhannon* requires. 532 U.S. at 604." *Id.*

Because petitioner did not qualify as a prevailing party in the Fourth Circuit's view, the court vacated the award of attorney's fees.

REASONS FOR GRANTING THE WRIT

By granting certiorari, this Court will resolve a widely acknowledged, long-standing and frequently recurring circuit division on an important question of law – whether § 502(g)(1) requires prevailing party status for an award of attorneys' fees. The Fourth Circuit's decision that "only a prevailing party is entitled to consideration for attorneys' fees in an ERISA action" is incorrect and directly conflicts with other circuits (and the clear language and structure of the statute). This split has festered and the lower courts have not converged.

This case also presents a recurring question on which the circuits have split – whether a court-ordered remand for reconsideration of an ERISA benefits decision and subsequent grant of benefits permits an award of attorney's fees and costs.

Review by this Court plainly is warranted to provide needed uniformity on these issues that have profound implications for this comprehensive statute affecting millions of workers across the United States. ERISA was enacted to provide consistent rules across the United States to govern the administration and enforcement welfare and pension benefit plans, especially given that many ERISA plans are national in scope. Plan participants should not be treated differently in an action to enforce their statutory rights based on the circuit in which they live. Yet, that is precisely what is occurring due to the current unsettled state of the law.

This case is an ideal vehicle for the Court to settle these critical questions regarding the enforcement of ERISA. The Court should grant certiorari.

I. The Circuits Conflict On Whether Attorney's Fees May Be Awarded at the District Court's Discretion To Either Party or Only to a "Prevailing Party" Under § 502(g).

To assist participants, beneficiaries, or fiduciaries of ERISA-governed plans to enforce their rights, Congress provided in § 502(g)(1) that "[i]n any action . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) (citing § 502(g)(1) and noting its purpose: "in answer to a possible concern that attorney's fees might present a barrier to maintenance of suits for small claims, thereby risking underenforcement of beneficiaries' statutory rights, it should be noted that ERISA authorizes the award of attorney's fees"). This Court has acknowledged that attorney's fees and costs may be awarded to either party under § 502(g). *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 53 (1987) ("In an action under these civil enforcement provisions, the court in its discretion may allow an award of attorney's fees to either party. § 502(g).")

Nonetheless, "[t]here is a significant split of authority between–and within–federal appeals courts on whether [§ 502(g)(1)] requires a party to prevail for a fee award." *McKay v. Reliance Std. Life Ins. Co.*, 46 Employee Benefits Cas. (BNA) 1272, 2009 U.S. Dist. LEXIS 16667 (E.D. Tenn. Mar. 3, 2009); *see also* Eric C. Surette, Annotation, *Requirement that Party Prevail to Obtain Attorney's Fees under § 502 (g) of ERISA*, 172 A.L.R. Fed. 571 (2001) (reviewing split of authority within and among the circuits on the issue). Indeed, even "[t]hose courts that have recognized the split of

authority do not interpret the conflicting decisions in a uniform manner." *Colby v. Assurant Employee Benefits, et al.*, Civil Action No. 07-11488-RCL, 2009 U.S. Dist. LEXIS 65340, *8, n.3 (D. Mass. July 22, 2009) (describing conflicting interpretations of whether particular circuits require a party to prevail in order to be eligible to recover fees and costs).

The Court should decide this important yet unresolved issue to bring clarity to the existing state of confusion in the lower courts regarding whether a prevailing party requirement exists within § 502(g)(1). *See* Rule 10(a), (c).

A. The Courts of Appeals Are Intractably Divided Over the Question Presented.

In interpreting § 502(g)(1), the lower courts are in disarray regarding whether a party must prevail to obtain attorney's fees. The Fourth Circuit clearly has imposed a prevailing party requirement, and the Tenth Circuit appears to as well; the Second, Fifth and Eleventh Circuits expressly have rejected this interpretation; and other circuits issued indeterminate or conflicting opinions on the issue.

The Fourth Circuit in this case held that it "is well settled 'that only a prevailing party is entitled to consideration of attorneys' fees in an ERISA action.'" App. 7a-8a (quoting *Martin v. Blue Cross & Blue Shield of Va., Inc.*, 115 F.3d 1201, 1210 (4th Cir. 1997)). In effect, the Fourth Circuit has read a "prevailing party" standard into § 502(g)(1) without grounding in the statutory language.

The Tenth Circuit has recognized that § 502(g)(1) contains no express requirement that a party prevail

to obtain an award of fees and costs, but nonetheless takes into account prevailing party status in determining whether to reverse, deny, or grant awards:

> Courts considering whether to award attorney's fees in ERISA actions consider five factors: a party's culpability or bad faith; its ability to satisfy an award of fees; the deterrence value of an award; the number of plan participants affected by the case or the significance of the impact of the legal question involved; and "the relative merits of the parties' positions." *Gordon*, [*v. U.S. Steel Corp.*, 724 F.2d 106, 109 (10th Cir. 1983)]. We also afford certain weight to prevailing party status, even though we acknowledge that the ERISA attorney's fees provision is not expressly directed at prevailing parties. *See, e.g., Deboard v. Sunshine Mining & Ref. Co.*, 208 F.3d 1228, 1245 (10th Cir. 2000) (reversing and remanding an attorney's fee award because appellate decision "alter[ed] the relative merits of the parties' positions"); *Morgan v. Indep. Drivers Ass'n Pension Plan*, 975 F.2d 1467, 1471 (10th Cir. 1992) ("Although the statute does not expressly require that a party prevail as a condition to receiving an award of attorneys' fees . . . we have remanded cases for denial of fees without explanation only when the party seeking fees had prevailed at least partially." (citations omitted)); *Arfsten v. Frontier Airlines, Inc. Ret. Plan for Pilots*,

> 967 F.2d 438, 442 n.3 (10th Cir. 1992) ("Because we reverse the district court's decision on the merits, plaintiff is not a prevailing party, and his arguments on attorney's fees are moot.").

Graham v. Hartford Life & Accident Ins. Co., 501 F.3d 1153, 1162 (10th Cir. 2007). *See also, Chambers v. Family Health Plan Corp.*, 100 F.3d 818, 828 (10th Cir. 1996) (recognizing § 502(g)(1) permits a fee award to either party but declining to award fees or remand for the district court to determine the issue because the plaintiff did not prevail on any of his claims); *Anderson v. Emergency Medicine Assoc.*, 860 F.2d 987, 992 (10th Cir. 1988) (characterizing a request for attorney's fees and costs by a party that did not prevail as "unsupportable").

In contrast, three circuits have held explicitly that a party need not prevail to obtain attorney's fees under § 502(g)(1). For example, the Second Circuit, noting the distinction Congress drew in amending the ERISA fees provision in 1980, held that "Section 502(g)(1) contains no requirement that the party awarded attorneys' fees be the prevailing party. *Cf.* 29 U.S.C. § 1132(g)(2)." *Miller v. United Welfare Fund*, 72 F.3d 1066, 1074 (2d Cir. 1995). The Fourth Circuit in *Martin* cited this contrary decision in *Miller*, but declined to follow it without explanation. *Martin*, 115 F.3d at 1210.

The Eleventh Circuit, like the Second Circuit, has followed the plain language of § 502(g)(1) and held that it allows a court to award fees to either party, regardless of "prevailing party" status: "Unlike other fee-shifting provisions, which give the court discretion

to award fees to a prevailing party, § [502(g)(1)] allows a court to award fees to either party." *Freeman v. Continental Ins. Co.*, 996 F.2d 1116, 1119 (11th Cir. 1993). *See also*, *Sharron v. Amalgamated Ins. Agency Services, Inc.*, 704 F.2d 562, 569 (11th Cir. 1983) (noting "under ERISA, *see* 29 U.S.C.A. § 1132(g), the losing party may under certain circumstances be entitled to attorney's fees . . .").

The Fifth Circuit in *Gibbs v. Gibbs*, 210 F.3d 491, 503 (5th Cir. 2000), examined the Fourth Circuit's *Martin* decision in detail and expressly rejected it. Analyzing the language of § 502(g)(1), the Fifth Circuit remarked that the term "prevailing" is "[c]onspicuously absent," although Congress often uses the term in other fee-shifting statutes. *Id.* at 501. After surveying the conflicting opinions in other circuits, the Fifth Circuit concluded that "the greater weight of authority, from outside and within our own circuit, supports the notion that a party need not prevail in order to be eligible for an award of attorneys' fees under § 1132(g)(1) of ERISA." *Id.* at 501-503.[2]

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[2] The Fifth Circuit appears to have retreated from *Gibbs* for purposes of determining costs under § 502(g)(1), requiring a party to meet a "prevailing party" standard. *See Wade v. Hewlett-Packard Dev. Co. LP Short Term Disability Plan*, 493 F.3d 533, 543 (5th Cir. 2007) ("[W]e read [*Salley v. E.I. DuPont de Nemours & Co.*, 966 F.2d 1011, 1017 (5th Cir. 1992)] now as establishing, for ERISA's fee-shifting provision, a 'prevailing party' test, analogous to the test under Fed. R. Civ. P. 54(d), for the award of costs. As *Salley* is the first case to discuss the award of costs under ERISA, *Salley*'s application of the 'prevailing party' test controls this case."). *Wade* involved an award of costs only, not attorneys' fees. *Ibid.*, at 537. *Wade* sows further confusion in the lower courts as to whether prevailing party status is required for an award of attorney's fees and costs and provides further support for granting certiorari.

The Sixth Circuit likewise appears not to require a prevailing party status for an award of fees. For example, in *First Trust Corp. v. Bryant*, 410 F.3d 842, 851 (6th Cir. 2005), the Sixth Circuit emphasized that "the court, in its discretion, '*may* allow a reasonable attorney's fee and costs of action to *either* party." (emphasis in original). In *Bryant*, the court ultimately held that the district court erred in awarding attorney fees under § 502(g)(1) to the former trustee of an ERISA-governed pension plan because the equities favored the pension plan beneficiary and relevant factors weighed against such an award to the trustee in that interpleader action. *But see*, *McKay*, 2009 U.S. Dist. LEXIS 16667, at *10 (recognizing "lack of controlling Sixth Circuit law" on the issue and analyzing circuit and intra-circuit splits).

The First Circuit has issued conflicting authority on whether a party must prevail to obtain an award of fees and costs, which adds to the unsettled nature of the law on this important question. *Compare Doe v. Travelers Ins. Co.*, 167 F.3d 53, 61 (1st Cir. 1999) ("Naturally, [awards under Section 502] are normally for the prevailing party, if at all . . .") *and Cottrill v. Sparrow, Johnson & Ursillo, Inc.*, 100 F.3d 220, 225 (1st Cir. 1996) (stating "Congress declared that, in any ERISA claim advanced by a 'participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee to the prevailing party. 29 U.S.C. § 1132(g)(1)" and thereafter assuming only "prevailing plaintiffs and prevailing defendants" can recover fees and costs) *with Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 258 (1st Cir. 1986). (holding courts should use a five-factor balancing approach for determining whether a court should award fees and costs in an

ERISA action "regardless of which party prevails."). *But see, Colby*, 2009 U.S. Dist. LEXIS 65340, at *5 ("the First Circuit has consistently read [Section 502(g)] as limiting recovery of fees and costs to prevailing parties").

Although the Seventh Circuit recently appears in line with the Fourth Circuit, requiring prevailing party status before awarding fees, its prior contrary decision has not been overruled. *See Janowski v. International Broth. of Teamsters Local No. 710 Pension Fund*, 812 F.2d 295, 297 (7th Cir. 1987) (reversing award of attorney's fees where party did not meet "prevailing party" test). *See also, Tate v. Long Term Disability Plan For Salaried Employees of Champion Int'l Corp. #506*, 545 F.3d 555, 564 (7th Cir. 2008) (refusing to award fees without prevailing party status); *Trustmark Life Ins. Co. v. University of Chicago Hosps.*, 207 F.3d 876, 884 (7th Cir. 2000) ("Our decision to reverse the district court's judgment means that Trustmark is no longer a prevailing party, and, therefore, is no longer entitled to an award of attorney's fees."). The Seventh Circuit previously held that "[t]here is no requirement that a party must 'prevail' in order to receive an award pursuant to § 1132(g). But, as a practical matter, we recognize that a court is more likely to find appropriate an award to a prevailing party than an award to a non-prevailing party." *Marquardt v. N. Am. Car Corp.*, 652 F.2d 715, 718 n.2 (7th Cir. 1981). This has led some courts and commentators to find that the Seventh Circuit has conflicting authority on the issue. *See Colby*, 2009 U.S. Dist. LEXIS 65340, *8-9, n.3 (noting different conclusions courts and commentators have drawn from the Seventh

Circuit's cases). Of course, this confusion simply highlights the need for clarity.

Finally, the Eighth Circuit in *Antolik v. Saks, Inc.*, 463 F.3d 796 (8th Cir. 2006), stated the question is open in its circuit, but allowed fees potentially to be awarded to a non-prevailing party, which is in direct conflict with the Fourth Circuit:

> The district court's award of substantial attorneys' fees must also be reversed because plaintiffs are no longer prevailing parties. However, it is an open issue in this circuit whether attorneys' fees may be awarded under 29 U.S.C. § 1132(g)(1) to an ERISA plan claimant who does not prevail. . . . But Saks's deceptive behavior and flagrant disregard of its ERISA disclosure duties may make this the rare case where some modest award is appropriate. That is an issue we leave in the first instance to the district court's discretion. Accordingly, the judgment of the district court is reversed and the case is remanded for entry of judgment on the merits in favor of Saks and for further consideration of the attorneys' fee issue

Ibid., at 803. It also conflicts with the Tenth Circuit's refusal to remand for an award of attorney's fees to a non-prevailing party. *See Arfsten*, 967 F.2d at 442 n.3 (reversing decision on merits and holding "plaintiff is not a prevailing party [so] his arguments on attorney's fees are moot.")

Clearly, the Court's intervention is needed to resolve this intolerable conflict within the lower courts. Rule 10(a).

B. Petitioner's Case Is an Ideal Vehicle for Resolving the Question.

This case cleanly and squarely presents this important issue for resolution. As noted, Reliance challenged on appeal only whether Hardt was a "prevailing party," not whether she was entitled to fees and costs under the five-factor approach. *See* supra, 9-11. Thus, this case is a uniquely appropriate vehicle to determine whether § 502(g)(1) requires prevailing party status for fees to be awarded, as the issue directly determined the outcome below.

C. Certiorari Is Further Warranted Because This Issue Is Both Frequently Recurring and Important.

This Court has acknowledged "Congress's intent to establish the regulation of employee welfare benefit plans 'as exclusively a federal concern'" and to create uniformity in benefit administration and enforcement of ERISA plans. *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656-57 (1995). The Court also has recognized that a fundamental purpose of the attorney's fees provision in ERISA is to prevent underenforcement of these exclusively federal statutory rights. *See Russell*, 473 U.S. at 147 ("in answer to a possible concern that attorney's fees might present a barrier to maintenance of suits for small claims, thereby risking underenforcement of beneficiaries' statutory rights, it should be noted that ERISA authorizes the award of attorney's fees").

This statutory enforcement provision is essential, particularly as our aging workforce retires and relies more heavily on ERISA pension and welfare plans in even greater numbers.

The reach of ERISA is staggering. As noted by the United States Department of Labor's Employee Benefits Security Administration, their oversight authority "extends to nearly 700,000 retirement plans, approximately 2.5 million health plans, and a similar number of other welfare benefit plans, such as those providing life or disability insurance," which cover about 150 million workers and their dependents." *Fact Sheet: EBSA Achieves $1.2 Billion in Total Monetary Results in Fiscal Year 2008*, available at http://www.dol.gov/ebsa/newsroom/fsFY08results.html (last visited October 13, 2009). Ensuring an effective private enforcement provision for ERISA therefore is critical.

According to the Administrative Office of the United States Courts, approximately 9,000 to 11,000 ERISA cases were filed in federal court each year from 2004 through 2008. *See* 2008 Annual Report of the Director: Judicial Business of the United States Courts, Appendix Table C-2A, Cases Commenced, by Nature of Suit, 2004 Through 2008, available at http://www.uscourts.gov/judbus2008/appendices/C02ASep08.pdf (last visited October 13, 2009). Excepting prisoner petitions, ERISA cases comprise the third highest statutory-based civil claims filed in the federal courts, behind employment and other civil rights claims. *See id.* Whether attorney's fees should be awarded therefore arises in a significant number of cases and is frequently recurring in the lower courts.

Given ERISA's far-reaching impact, its goal for uniformity across the United States and the enforcement mechanisms embodied in the statute to ensure rights are protected, it is especially important that workers within the Fourth Circuit not be treated differently in actions to enforce their statutory rights when compared to workers in other parts of the country. This is particularly critical given that many ERISA plans are national in scope. A worker in Maryland or Virginia should have the same right to receive attorney's fees in bringing suit under ERISA as a worker in Florida, Texas or New York. Yet, under the current unsettled state of the law, that is not occurring.

The Court should step in to resolve the untenable split in the lower courts on this vital ERISA enforcement issue, and this case is a fitting vehicle directly presenting the question.

D. The Fourth Circuit's Decision Conflicts with This Court's Prior Reasoning and Is Incorrect on the Merits.

This Court has repeatedly emphasized that ERISA in particular is a "comprehensive and reticulated statute" with "carefully integrated civil enforcement provisions," *Russell*, 473 U.S. at 146 (quoting *Nachman Corp. v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361 (1980)). The Act is "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests -- not all in favor of potential plaintiffs." *Mertens v. Hewitt Associates*, 508 U.S. 248, 262 (1993) Given the "evident care" with which ERISA was crafted, this Court has been

"reluctant to tamper with [the] enforcement scheme" embodied in the statute. *Russell*, 473 U.S. at 147 (declining to create an implied private cause of action for extracontractual damages); *see also Mertens*, 508 U.S. at 262 (rejecting claim that ERISA allows cause of action against a nonfiduciary who knowingly participates in a fiduciary breach); *Dedeaux*, 481 U.S. 41, 56, (holding that civil enforcement scheme codified at § 502(a) is not to be supplemented by state-law remedies). Contrary to this inclination not to upset the carefully crafted civil enforcement provisions of ERISA, the Fourth Circuit erroneously has read a "prevailing party" requirement into § 502(g)(1), despite such language being "conspicuously absent" from that section. *See Gibbs*, 210 F.3d at 501.

Such a reading not only is contrary to prior decisions of this Court, but it also is wrong on the merits. Section 502(g)(1) unambiguously states that "the court in its discretion may allow a reasonable attorney's fee and costs of action *to either party*." 29 U.S.C. § 1132(g)(1) (emphasis added). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what is says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Had Congress intended a prevailing party restriction in § 502(g)(1), it would have included it, as Congress did in numerous other fee-shifting statutes. *See* Samuel R. Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. Pa. L. Rev. 281, 305 nn.109-10 (1977) (collecting statutes with express prevailing party requirements in existence around time ERISA was enacted in 1974). This conclusion is reinforced when one considers that, in most cases, only one party prevails. It thus is

an unwarranted interpretation to jump from the clear Congressionally-enacted language that a court may award fees and cost "to either party" to read the statute as stating that "only a prevailing party is entitled to consideration for attorneys' fees."

Moreover, when Congress subsequently amended ERISA, it left what is now § 502(g)(1) alone, but added a provision (what is now § 502(g)(2)) requiring attorney's fees and other relief where "judgment in favor of the plan is awarded." *See* Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, § 306(b), 94 Stat. 1208, 1295 (1980), as codified at 29 U.S.C. § 1132(g)(2). The clear inference from this amendment and the resulting language and structure of § 502(g) is that Congress did not intend to require a prevailing party requirement in § 502(g)(1). *See Gross v. FBL Fin. Servs.*, --- U.S. ---, 129 S. Ct. 2343, 2349 (2009). That is, when Congress chooses to amend one statutory provision but not another, it is presumed to have acted intentionally, and the resulting differences generally compel an inference that the provision not amended does not contain the newly-inserted requirement. *See id.* ("negative implications raised by disparate provisions are strongest" where the provisions were "considered simultaneously when the language raising the implication was inserted") (citing *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256 (1991) and quoting *Lindh v. Murphy*, 521 U.S. 320, 330 (1997))). *See also*, *Miller*, 72 F.3d at 1074 (noting difference in language between §§ 502(g)(1) and 502(g)(2) in concluding no prevailing party requirement exists within § 502(g)(1)).

The Fourth Circuit's decision below on this important federal question conflicts with the reasoning of prior decisions of this Court and is wrong on the merits. The Court should grant certiorari to resolve the issue. *See* Rule 10(c).

II. The Courts of Appeal Are Divided On Whether a Remand For a Redetermination of Benefits Is Sufficient To Support an Award of Attorney's Fees and Costs Under § 502(g).

This case also squarely presents a second important issue – whether a claimant is entitled to attorney's fees under § 502(g)(1) where she secures a remand to her plan administrator for reconsideration of her benefits claim after persuading the district court that the plan administrator violated ERISA. There is an acknowledged split in the lower courts on this issue. *See Colby*, 2009 U.S. Dist. LEXIS 65340, *11 (stating First Circuit had not decided issue and recognizing "[c]ourts in other circuits have split almost evenly on the issue."). The Court should grant certiorari to consider fully the circumstances under which attorney's fees may be granted pursuant to ERISA § 502(g)(1).

In the case below, the Fourth Circuit held that petitioner was not a prevailing party entitled to attorney's fees. App. 10a-11a. The Fourth Circuit reached that conclusion by relying on its prior decision applying this Court's *Buckhannon* decision to ERISA claims. App. 7a (citing *Griggs v. E.I. Dupont de Nemours & Co.*, 385 F.3d 440, 454 (4th Cir. 2004)). It also relied on an Equal Access to Justice Act (EAJA) attorney's fees case, *Goldstein v. Moatz*, 445 F.3d 747 (4th Cir. 2006), which held that

this Court's *Buckhannon* standard applies to the EAJA and that *Buckhannon* does not allow for a "tactical mooting" exception to permit an award of fees where a defendant has agreed to the plaintiff's requested relief in order to avoid the prospect of an adverse fees and costs award. *See* App. 8a (citing *Goldstein*, 445 F.3d at 752). The Fourth Circuit in the case below determined that the district court's finding of an ERISA violation and remanding (under threat of judgment being entered in favor of petitioner) for a redetermination of whether petitioner qualified for benefits were "simply insufficient to overcome the statutory requirement that a party applying for a fees and costs award must first have been accorded some relief in the district court." App. 10a (quoting *Goldstein*, 445 F.3d at 752). The Fourth Circuit concluded petitioner was not a prevailing party entitled to attorneys' fees because the district court remand "did not require Reliance to award benefits" and, as such, was not an enforceable judgment on the merits. *Id.*

Cases in the Second and Ninths Circuits directly conflict with the Fourth Circuit's holding in this case. For example, in *Peterson v. Continental Casualty Co.*, 282 F.3d 112, 122 (2d Cir. 2002), the Second Circuit held that plaintiffs were prevailing parties when they succeeded after a court-ordered remand to an ERISA plan administrator with retention of jurisdiction. This directly conflicts with the Fourth Circuit's ruling below. *See also*, *Miller*, 72 F.3d at 1074 (ordering district court to remand the case to the plan administrator for a redetermination of benefits and ordering that the district court reconsider the grant of attorney's fees, insinuating that plaintiff may not be a prevailing party, but also

stating that "[t]he district court may in fact determine that Miller is the prevailing party to the extent that her motion for summary judgment claimed that the Fund's denial was arbitrary and capricious").

Likewise, the Ninth Circuit has allowed an award of attorneys' fees to a claimant when a case is remanded for a determination of benefits. *See White v. Jacobs Engineering Group Long Term Disability Ben. Plan*, 896 F.2d 344, 352 (9th Cir. 1990). In *White*, the district court had granted summary judgment to defendants on an employee's claim for benefits on the ground that he failed to exhaust his administrative remedies and also granted summary judgment to the defendants on their counterclaim for benefits paid while the employee allegedly was not totally disabled. *Id.* at 346. The Ninth Circuit reversed the grants of summary judgment "and remand[ed] to the district court with instructions to remand to the plan appeals board for adjudication on the merits." *Id.* at 352. Based on the remand for a determination of benefits, the Ninth Circuit held that the plaintiff-employee "is entitled to attorney fees in an amount to be determined by the district court." *Id.*

The Ninth Circuit in post-*Buckhannon* cases continues to hold that a district court's remand to a plan administrator confers "prevailing party" status upon an ERISA claimant. For example, in *Flom v. Holly Corp.*, 276 Fed. Appx. 615, 617 (9th Cir. 2008), the court concluded that the district court erred in denying a disability benefit claimant's motion for attorney's fees against the plan administrator under § 502(g)(1). It held that the district court's remand to

the administrator provided the "judicial imprimatur required by *Buckhannon*" for the claimant to be a prevailing party because it created "a judicially-sanctioned change" in claimant's "legal relationship with [the administrator] and ultimately led to [claimant's] success in securing a reinstatement of benefits." *Id.* Similarly, *Mizzell v. Provident Life and Accident Insurance Co.*, 32 Fed. Appx. 352, 353 (9th Cir. 2002), involved an ERISA action for recovery of long-term disability insurance benefits, and the district court concluded that the plan administrator abused its discretion, remanded the case to the plan administrator for a new determination of benefits eligibility, and awarded attorney's fees and costs to the plaintiff. The plan administrator appealed. The Ninth Circuit concluded that the award of fees was proper because plaintiff "succeeded on a significant issue in litigation, *i.e.*, whether [the plan administrator] abused its discretion in denying [plaintiff's] claim, which achieve[d] some of the benefit [plaintiff] sought in bringing suit, *i.e.*, to obtain a full and fair review of his claim." *Id.* at 354 (some internal punctuation omitted).

The Ninth Circuit also has found prevailing party status under ERISA when an employee-plaintiff secures the requested benefits via settlement on remand. In *Smith*, the district court dismissed the plaintiff's ERISA claims. On appeal, the Ninth Circuit found the employee stated a potential violation of ERISA and remanded. *See Smith v. CMTA-IAM Pension Trust*, 654 F.2d 650, 653-54, 656-60 (9th Cir. 1981) (*Smith I*). "Upon remand, the parties settled," with a provision allowing the parties to attempt agree on attorney's fees for the plaintiff

or, failing that, for the plaintiff to file a motion for fees. *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 589 (9th Cir. 1984) (*Smith II*). "The parties could not agree on the payment of plaintiff's attorney's fees, and [plaintiff-employee] moved for fees pursuant to 29 U.S.C. § 1132(g)(1)." *Id.* The district court denied the motion. On appeal, the Ninth Circuit found the plaintiff to be "a prevailing employee participant." *Smith II*, 746 F.2d at 590. Holding that "absent special circumstances, a prevailing ERISA employee plaintiff should ordinarily receive attorney's fees from the defendant," the Ninth Circuit directed the district court to reconsider its denial of fees. *Smith II*, 746 F.2d at 591.

In contrast, the Seventh Circuit in *Tate* held that a claimant who is awarded a remand in an ERISA case "generally is not a 'prevailing party' in the 'truest sense of the term.'" 545 F.3d at 564 (quoting *Quinn v. Blue Cross & Blue Shield Ass'n*, 161 F.3d 472, 478-79 (7th Cir. 1998)). Though the claimant in *Tate* urged the Seventh Circuit to reconsider *Quinn* in light of the Second and Ninth Circuit decisions in *Miller* and *White*, it refused to do so and ruled the claimant was not entitled to fees based on the remand. 545 F.3d at 564.

The circuits clearly have hardened in their positions, and this Court's intervention is needed to resolve the split on this issue of profound importance to the proper functioning of ERISA. Applying the *Buckhannon* test and allowing for tactical mooting in ERISA cases "would facilitate–rather than discourage–[a defendant's] bullying" and incent

defendants to "litigat[e] mischievously." *See Kholyavskiy v. Schlecht*, 479 F. Supp. 2d 897, 906 (E.D. Wis. 2007) (declining to apply *Buckhannon* to EAJA claims). Many ERISA claimants can seek only equitable relief via 29 U.S.C. § 1132(a)(3). In such circumstances, "the [defendant] can litigate vigorously to wear down the plaintiff and then 'tactically moot' the case prior to judicial action." *Id.*

Many participants or beneficiaries who bring suit to enforce their rights under ERISA are of limited means. *See, e.g.*, *Smith II*, 746 F.2d at 590 ("when an employee participant brings suit under ERISA, whether it is against the trustees or the employer, the resources available to the pensioner are limited."); *Marquardt*, 652 F.2d at 718 ("Lavern Marquardt is a retired man in his sixties. He receives an actuarily reduced pension from the Company, and the record does not show that he has any significant alternative source of funds."). Allowing plan administrators to "tactically moot" a case after vigorously opposing benefits at every step of the process until a judicially-ordered remand would lead to underenforcement of rights in contravention of one of the primary goals of ERISA. This is because, under the Fourth Circuit's holding, fee shifting would never apply in such a circumstance and the costs of securing an attorney could deprive a worker of her entire award (or more). Plan administrators therefore are incented to engage in such "you sue, you lose" tactics.

The Court should grant certiorari to resolve the circuit split on this important issue.

CONCLUSION

For the foregoing reasons, petitioner urges the Court to grant a writ of certiorari in this case.

Respectfully submitted,

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October 14, 2009

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1896

BRIDGET HARDT,

Plaintiff – Appellee,

v.

RELIANCE STANDARD LIFE INSURANCE COMPANY,

Defendant – Appellant,

and

DAN RIVER GROUP LONG–TERM DISABILITY PLAN,

Defendant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Jerome B. Friedman, District Judge. (2:07-cv-00105-JBF-JEB)

Argued: March 25, 2009 Decided: July 14, 2009

Before WILLIAMS, Chief Judge,[1] WILKINSON, Circuit Judge, and David A. FABER, Senior United States District Judge for the Southern District of West Virginia, sitting by designation.

Vacated by unpublished per curiam opinion.

ARGUED: Joshua Bachrach, WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP, Philadelphia, Pennsylvania, for Appellant. Ann Sullivan, CRENSHAW, WARE & MARTIN, PLC, Norfolk, Virginia, for Appellee. **ON BRIEF:** Elaine Kathryn Inman, CRENSHAW, WARE & MARTIN, PLC, Norfolk, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Reliance Standard Life Insurance Company ("Reliance") appeals an award of attorney's fees to Bridget Hardt, arguing that the district court's remand of Hardt's claim for long-term disability benefits to Reliance for additional consideration did not make Hardt a prevailing party for purposes of an attorney's fees award. We agree, and for the reasons below, we vacate the award of attorney's fees to Hardt.

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[1] Chief Judge Williams heard oral argument in this case but did not participate in the decision. The decision is filed by a quorum of the panel pursuant to 28 U.S.C. § 46(d).

I.

In 2000, Hardt was employed as an executive assistant to the president of Dan River Inc., a textile manufacturer. During that year, Hardt began experiencing pain in her neck and shoulders; she was diagnosed with carpal tunnel syndrome ("CTS") and underwent surgery on both of her wrists. Hardt continued experiencing pain, however, and stopped working on January 23, 2003.

In August 2003, Hardt requested that Reliance pay her long-term disability benefits pursuant to Dan River Inc.'s Group Long-Term Disability Insurance Program Plan ("the Plan"). Pursuant to the terms of the Plan, Dan River administers the Plan, but Reliance underwrites the Plan and decides whether a particular individual is entitled to benefits. In response to Hardt's request, Reliance notified Hardt that she was required to submit to a functional capacities evaluation ("FCE") and granted her a provisional approval.

Hand Rehabilitation of Hampton Roads administered the FCE to Hardt in October 2003. The evaluator concluded that Hardt suffered the following major limitations: neck and upper extremity pain, decreased right hand dexterity and strength, restricted overhead reach, a restricted ability to squat and kneel, the inability to crawl or to climb ladders, and decreased lift, carrying, and push and pull capabilities. In December 2003, Reliance denied Hardt's claim, concluding that she did not meet the Plan's definition of total disability. Pursuant to the terms of the Plan, Hardt appealed

this decision, and Reliance reversed its original decision so that Hardt ultimately received temporary disability benefits for twenty-four months.

In the meantime, Hardt was also diagnosed with hereditary small-fiber neuropathy,[2] and her pain became worse over the following months. In addition to other symptoms, Hardt experienced burning sensations in her feet and pain in her calves, making walking difficult.

Hardt applied to the Social Security Administration ("SSA") for disability insurance benefits and submitted two questionnaires completed by her treating physicians that concluded she could not return to her prior position or other sedentary positions because of her neuropathy and other maladies. The SSA found that Hardt was "disabled" under the Social Security Act because she was unable to return to her former employment or make an adjustment to perform other work.

A few months later, Reliance notified Hardt that her benefits would expire at the end of the twenty-four month period. The Plan provided benefits after twenty-four months only to individuals totally disabled from all occupations. Reliance, having reviewed the medical documentation in Hardt's file and a Residual Employability Analysis that found she had several employment

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[2] Small-fiber neuropathy is a disorder involving small sensory cutaneous nerves. Symptoms include tingling; numbness; burning pain or extreme coldness; brief, painful sensations; and loss of temperature sensation.

opportunities still available, found that Hardt was not totally disabled under the Plan.

Hardt again appealed this denial of her claim to Reliance and, in support of her claim, submitted her medical records, the SSA questionnaires completed by her treating physicians, and an updated questionnaire from one of those physicians that again opined Hardt would be unable to maintain a job. Reliance requested that Hardt complete an updated FCE before making a final decision on her claim, but did not request that the testing company review Hardt for neuropathic pain.

Hardt underwent the updated FCE on December 29, 2005 and a second updated FCE on January 26, 2006, but the results of both examinations were considered invalid by the examiners because Hardt's effort was submaximal. Specifically, one examiner noted that Hardt "refused multiple tests . . . for fear of nausea/illness/further pain complaints." (J.A. at 475.)

Reliance then hired Dr. Michael Leibowitz, who reviewed only some of Hardt's medical records. In his report, Dr. Leibowitz does not mention any of the pain medications Hardt was taking or the treating physicians' questionnaires. Dr. Leibowitz ultimately concluded that Hardt's health was expected to improve. Reliance also hired a vocational rehabilitation counselor to determine if any jobs existed that Hardt could perform. That labor market study identified eight employment opportunities suitable for Hardt, but the study was based on Hardt's health in 2003.

On March 27, 2006, Reliance advised Hardt that, based on its review of her file, she was still ineligible to receive long-term disability benefits. Reliance's decision was based on the FCEs, Dr. Leibowitz's report, and the labor market study.

Hardt exhausted her administrative remedies and filed a complaint in the United States District Court for the Eastern District of Virginia, alleging that Reliance violated ERISA by wrongfully denying her long-term disability benefits. The district court denied both parties' motions for summary judgment, but remanded Hardt's claim to Reliance Standard for reconsideration. In remanding Hardt's claim, the district court stated that if Reliance did not adequately consider all of the evidence discussed in its opinion within 30 days of the date the opinion was issued, "judgment will be issued in favor of Ms. Hardt." (J.A. at 65.)

On remand, Hardt provided additional medical records to Reliance for its consideration, and Reliance ultimately reversed its earlier decision and awarded Hardt full long-term disability benefits until her sixty-sixth birthday, as well as retroactive benefits for the time already elapsed. Hardt then filed a motion for attorney's fees and costs in the district court based upon her status as the prevailing party.[3] See 29 U.S.C.A. § 1132(g)(1) (West 2009)

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[3] This case was originally heard by the Honorable Walter D. Kelley, who remanded the case back to Reliance for reconsideration, and who resigned effective May 16, 2008. Upon Judge Kelley's resignation, the case was transferred to the Honorable Jerome B. Friedman, who heard and ruled upon Hardt's motion for attorney's fees.

(providing that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.). The district court granted her motion on August 7, 2008, concluding that "the court sanctioned a material change in the legal relationship of the parties by ordering [Reliance] to conduct the type of review to which [Hardt] was entitled," and that because, "on remand, [Hardt] received precisely the benefits she had sought, she meets the definition of a 'prevailing party' and is eligible for an award of attorneys' fees." (J.A. at 79.) The district court thus awarded Hardt $39,149.00 in fees, and Reliance timely appealed. We have jurisdiction pursuant to 28 U.S.C.A. § 1291 (West 2006).

II.

We review de novo the district court's determination that Hardt was a "prevailing party" for purposes of awarding attorney's fees. See Goldstein v. Moatz, 445 F.3d 747, 751 (4th Cir. 2006) (performing de novo review of whether applicant for attorney's fees was a prevailing party under EAJA).[4]

A.

It is well settled that "only a prevailing party is entitled to consideration for attorneys' fees in an

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[4] Fee-shifting provisions are generally interpreted consistently. See Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 603 n.4 (2001), and Griggs v. E.I. DuPont de Nemours & Co., 385 F.3d 440, 454 (4th Cir. 2004) (applying Buckhannon to ERISA claims).

ERISA action." Martin v. Blue Cross & Blue Shield of Va., Inc., 115 F.3d 1201, 1210 (4th Cir. 1997). To be a prevailing party, "a plaintiff [must] receive at least some relief on the merits of his [or her] claim." Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 603 (2001)). "[E]ven an award of nominal damages suffices under this test." Id. at 604. The Supreme Court has, however, established a bright-line boundary on what constitutes "relief on the merits" of a particular claim: only "enforceable judgments on the merits and court-ordered consent decrees create the material alteration of the legal relationship of the parties necessary to permit an award of attorney's fees." Buckhannon, 532 U.S. at 604 (internal quotation marks omitted).

In Goldstein, we clarified this Buckhannon standard by holding that there is no exception for "tactical mooting" - the situation where a defendant chooses to settle rather than risk an award of attorney's fees. Goldstein, 445 F.3d at 752. Although Buckhannon does not specifically address tactical mooting, we explained in Goldstein that "[t]he Supreme Court in Buckhannon . . . did not leave the door ajar for an inferior court to engraft a broad tactical mooting exception onto its ruling . . . [and the Court instead] concluded that tactical mooting concerns are simply insufficient to overcome the statutory requirement that a party applying for a fees and costs award must first have been accorded some relief in the district court." Id. In Goldstein, however, we left open the question of "whether there is an exception to the Buckhannon rule where a defendant has agreed to provide the relief requested

in response to an affirmative indication by the presiding court that the plaintiff is about to prevail." Id.

In this case, the district court determined that Hardt was a prevailing party based upon a previous remand order. That order denied both cross-motions for summary judgment but required Reliance to reconsider Hardt's claim within 30 days and stated that if Reliance did not comply, "judgment will be issued in favor of Ms. Hardt." (J.A. at 65.) Although the district court, reviewing the earlier remand order, noted that at the time the case was remanded, it had been "inclined to reserve judgment and permit [Reliance] to conduct a proper review of all of the medical evidence" and explained that "[h]ad [Reliance] completed its review in the manner ordered by the court and in the prescribed time period, and again determined that [Hardt] was not eligible for benefits, it is certainly possible that the court would have found the result satisfactory," (J.A. at 77), the district court found Hardt to be a prevailing party because, "on remand, [Hardt] received precisely the benefits she had sought," (J.A. at 79). As the district court explained, "[t]he defendant, under threat of judgment against it, reversed its decision and chose to award the plaintiff the precise relief she was seeking." (J.A. at 77.) In the district court's view, this "[c]learly" constituted "judicially sanctioned relief." (J.A. at 77.)

B.

On appeal, Reliance contends that, at best, this is a case of "tactical mooting" and that there was

no enforceable judgment on the merits or judicially sanctioned relief. We agree. Hardt's case presents a set of circumstances that, like those presented in Goldstein, are "simply insufficient to overcome the statutory requirement that a party applying for a fees and costs award must first have been accorded some relief in the district court." Goldstein, 445 F.3d at 752.

Hardt attempts to fit her case within the question we left open in Goldstein, but that opening provides her no relief. Hardt's case simply does not present the type of affirmative indication contemplated by Goldstein. On remand, the district court required Reliance to provide Hardt with an appropriate review of her claim; it gave no indication that Hardt was "about to prevail." Id. Had Reliance continued to refuse Hardt complete disability benefits after further review, Hardt would have had the opportunity to bring the decision back before the district court, at which time the court could rule on the merits of the claim. Because it did not require Reliance to award benefits to Hardt, however, the remand does not constitute an "enforceable judgment[] on the merits" as Buckhannon requires. 532 U.S. at 604.

To avoid this result, Hardt points to two district court cases in which a party was awarded attorney's fees after a remand to a plan administrator: Clark v. Metro Life Ins. Co., 384 F. Supp. 2d 894 (E.D. Va. 2005), and Christian v. DuPont-Waynesboro Health Care Coverage Plan, 12 F. Supp. 2d 535 (W.D. Va. 1998). Even assuming these cases are consistent with Buckhannon, they do

not aid Hardt. In each of those cases, the plaintiff included a second count alleging procedural error under ERISA and requesting remand as the appropriate legal relief. Thus, by remanding the case, the district court in those cases was providing the very relief requested by the complaint. Hardt, however, did not include such a count in her complaint.

Because (1) Hardt's only request for relief was the award of benefits, which the district court did not award, and (2) the district court's remand order did not satisfy the requirements of Buckhannon or Goldstein, Hardt does not qualify as a prevailing party and is thus not eligible for an award of attorney's fees.

III.

For the foregoing reasons, Hardt's attorney's fees award is

VACATED.

[ENTERED: AUGUST 7, 2008]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

BRIDGET HARDT,

Plaintiff,

v. **Civil Action No. 2:07cv105**

RELIANCE STANDARD LIFE INSURANCE CO.,

and

DAN RIVER GROUP LONG-TERM DISABILITY PLAN,

Defendants.

OPINION AND ORDER

Pending before the court is a motion for attorneys' fees and costs, filed by the plaintiff, Bridget Hardt, pursuant to the fee shifting provision of the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(g)(1). After examination of the briefs and record, this court determines that oral argument is unnecessary because the facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument The court, for the reasons stated fully herein, **GRANTS** the plaintiff's motion for an award of attorneys' fees.

I. Factual and Procedural Background

The facts and the procedural history of this case are more fully detailed in the court's order of March 27, 2008,[1] denying the parties' cross-motions for summary judgment and remanding the case to defendant Reliance Standard Life Insurance Company (hereinafter "the defendant")[2] for reconsideration of all of the medical evidence in the opinion regarding the plaintiff's disability.[3] On remand, the defendant reversed its decision regarding long-term disability coverage for the plaintiff, and awarded her benefits retroactive to August 23, 2005 and prospectively until her 66th birthday.

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[1] This case was originally assigned to the docket of former U.S. District Judge Walter D. Kelley, and it was Judge Kelley who ordered that the case be remanded to the defendant for reconsideration. After Judge Kelley's resignation effective May 16, 2008, the case was transferred to the docket of the undersigned.

[2] As the court's previous orders make clear, the Dan River Group Long-Term Disability Plan ("the Plan") is administered by Dan River, Inc., but defendant Reliance serves the dual roles of deciding whether a claimant is entitled to benefits and paying such benefits. Accordingly, although the Plan is named as a defendant, the instant motion seeks recovery of attorneys' fees and costs only from Reliance.

[3] That order directed that, if the defendant did not complete its reevaluation within the prescribed time period, judgment would issue in favor of the plaintiff. The parties have confirmed to the court that the defendant completed the reevaluation within the time period as instituted by the court in the March 27, 2008 order and modified by order dated April 24, 2008.

On July 11, 2008, the plaintiff filed the instant motion for attorneys' fees and costs, contending that she is the "prevailing party" in this matter, and that an award of fees in this matter would be proper under the five-factor guideline approach announced by the Fourth Circuit in Quesinberry v. Life Ins. Co. of N. America, 987 F.2d 1017, 1028-29 (4th Cir. 1993). In support of the motion, the plaintiff filed a largely self-serving affidavit from one of her attorneys, explaining the fees charged and contending that such fees are fair and commensurate with the fees billed by other attorneys practicing in similar matters in this court. The plaintiff requests an award of attorneys' fees in the amount of $58,920.73, plus costs. On July 18, 2008, the defendant filed a response brief, contending that the plaintiff is not a prevailing party and therefore not entitled to an award of fees, and regardless, that the requested fees are unjustifiably inflated. The plaintiff filed a reply brief on July 25, 2008, further arguing in favor of an award of fees and including the affidavit of Richard C. Mapp, III, a Norfolk attorney unaffiliated with the plaintiff's attorneys, who attests to having reviewed the billing statements in this matter and opines that the

requested fees are reasonable.[4] The matter is therefore ripe for consideration.

II. Standard of Review

ERISA provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g). Although not statutorily-mandated, the Fourth Circuit has held that "only a prevailing party is entitled to consideration for attorneys' fees in an ERISA action." Martin v. Blue Cross & Blue Shield of Virginia, Inc., 115 F.3d 1021, 1210 (4th Cir. 1997). A party may be called a "prevailing party" for the

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[4] On July 30, 2008, the defendant filed a motion to strike the plaintiff's reply brief, contending that its filing was tardy and that, regardless, it addressed matters outside the response brief. Further, the defendant claims that the affidavit of Richard C. Mapp, III, is incomplete in various facets. At the outset, it is noted that the plaintiff's reply brief was in fact timely filed, in accordance with Fed. R. Civ. P. 6(d), which adds three days to the deadline for the filing of certain documents. See United States District Court, Eastern District of Virginia, Electronic Case Filing Policies and Procedures, at 25, available at http://www.vaed.uscourts.gov/ecf/ECF%20USERS%20MANUAL.pdf. Thus, the defendant's response brief was served on the plaintiff on July 17, 2008. Under Rule 7(F) of the Rules of the United States District Court for the Eastern District of Virginia, the plaintiff was afforded three days from the date of service to file a reply brief. However, the weekend of July 19-20 is not counted when computing this deadline, see Fed. R. Civ. P. 6(a)(2), and the so-called "mailing rule" extended the due date an additional three days, making the reply brief due on July 25, 2008, the date on which it was filed. With regard to the contention that the plaintiff's reply brief raises additional arguments not addressed in the plaintiff's original brief, the court finds that in fact the reply brief is limited in scope to responding to the claims raised in the defendant's brief in opposition. Accordingly, the motion to strike is **DENIED**.

purposes of fee-shifting provisions only if he has received at least some relief on the merits of his claim. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 603 (2001).

Once the court determines that a party is properly construed as "prevailing," it is guided by the five factors adopted by the Fourth Circuit in Reinking v. Philadelphia American Life Ins. Co., 910 F.2d 1210, 1217-18 (4th Cir. 1990), and further clarified in Quesinberry, in determining whether an award of attorneys' fees is appropriate. Quesinberry, 987 F.2d at 1028-29. These factors are:

> (1) the degree of opposing parties' culpability or bad faith;
>
> (2) ability of opposing parties to satisfy an award of attorneys' fees;
>
> (3) whether an award of attorneys' fees against the opposing parties would deter other persons acting under similar circumstances;
>
> (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and
>
> (5) the relative merits of the parties' positions.

Id. at 1029. The Quesinberry court clarified that this approach "is not a rigid test, but rather provides general guidelines for the district court in determining whether to grant a request for attorneys' fees." Id.

If a court determines that an award of fees is appropriate, it must review the attorneys' fees and costs requested and limit them to a reasonable amount. See, e.g., Allen v. U.S., 606 F.2d 432, 436 (4th Cir. 1979). The "starting point for determining reasonable attorneys' fees is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Hensley v. Eckerhart, 416 U.S. 424, 433 (1983). The plaintiff bears the burden of proving the reasonableness of the requested hourly rate and should produce affidavits from her attorneys as well as "specific evidence of the 'prevailing market rates in the relevant community'" for the type of work performed in this litigation. Plyler v. Evatt, 902 F.2d 273, 277 (4th Cir. 1990) (quoting Blum v. Stenson, 465 U.S. 886, 895 (1984)). In analyzing the reasonableness of the fee request, the court should look to the multi-factor analysis established by the Fifth Circuit in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). See Blum, 465 U.S. at 897; Allen, 606 F.2d at 433. Pursuant to Johnson, the court should analyze:

> (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the preclusion of other employment by

> the lawyer due to acceptance of the case; (5) the customary fee for similar work; (6) the contingency of a fee; (7) the time pressures imposed in the case; (8) the award involved and the results obtained; (9) the experience, reputation, and ability of the lawyer; (10) the 'undesirability' of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between the lawyer and the client; and, (12) fee awards made in similar cases.

Allen, 606 F.2d at 433.

III. Discussion

A. Prevailing Party Status

The parties devote a portion of their briefs to addressing whether the plaintiff actually can be considered a "prevailing party" for the purposes of making her eligible for ERISA's fee-shifting provision. Specifically, the plaintiff argues that, because the defendant, on remand, ultimately decided to award her disability benefits-the exact relief she had requested in filing suit-she should be considered a "prevailing party" because she achieved a judicially sanctioned material change in her legal relationship with the defendant. The defendant counters by noting that the Supreme Court in Buckhannon specifically rejected the so-called "catalyst theory," noting that "it allows an award where there is no judicially sanctioned change in the

legal relationship of the parties." Buckhannon, 532 U.S. at 605.

The first issue to be resolved, then, is whether this court's order denying the parties' cross-motions for summary judgment and remanding for the defendant to fully consider all of the medical evidence, constitutes a "judicially sanctioned change in the legal relationship" between the plaintiff and the defendant. The plaintiff contends that the defendant's change in conduct was not voluntary, but was in fact required by the court's order. While the denial of the cross-motions for summary judgment is evidence of the fact that the court was not sanctioning a certain result on remand, the court quite clearly expressed the consequences to the defendant were it to fail to complete its reconsideration in an expeditious manner. Indeed, the order explicitly stated that, should the defendant not complete its review of the evidence within thirty days, "judgment will be issued in favor of Ms. Hardt." Opinion and Order of March 27, 2008, at 20. Had the court been of the opinion that neither party had a stronger case, then such an ultimatum would have been entirely unnecessary and even inappropriate. Accordingly, its use can only signify that the court was displeased with the cursory review that the defendant had initially given to the plaintiff's claim, but was inclined to reserve judgment and permit the defendant to conduct a proper review of all of the medical evidence. However, if such a review was not forthcoming, the

court would have sanctioned judgment in favor of the plaintiff.[5]

Although the Court in Buckhannon held that a plaintiff is not entitled to relief if he simply files a lawsuit and, in response, the defendant voluntarily changes his behavior,[6] the facts in this case remove it from the scope of the "catalyst theory," and into the realm of those cases where a court has sanctioned a change in the legal relationship between the parties. Thus, Buckhannon, although instructive, is ultimately inapposite. Although the Fourth Circuit does not appear to have addressed whether a plaintiff can be a "prevailing party" when her claims are remanded for reconsideration, the Alexandria Division of this court and other district courts within the Fourth Circuit have done so, concluding that, when an ERISA claim is remanded and the administrator decides to award benefits, the plaintiff is indeed a "prevailing party." See, e.g.,

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[5] Had the defendant completed its review in the manner ordered by the court and in the prescribed time period, and again determined that the plaintiff was not eligible for benefits, it is certainly possible that the court would have found the result satisfactory. Nonetheless, speculation as to what might have happened is useless in light of what actually did happen-namely, the defendant, under threat of judgment against it, reversed its decision and chose to award the plaintiff the precise relief she was seeking. Clearly, then, the plaintiff was afforded judicially sanctioned relief.

[6] The Court held: "We cannot agree that the term 'prevailing party' authorizes federal courts to award attorney's fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the 'sought-after destination' without obtaining any judicial relief." Buckhannon, 532 U.S. at 606 (internal citations omitted).

Clark v. Metro. Life Ins. Co., 384 F.Supp.2d 894, 897 (E.D. Va. 2005) (Cacheris, J.) (holding that the plaintiff was a prevailing party with respect to the portion of her complaint that sought a full and fair review of the medical evidence); Christian v. Dupont-Waynesboro Health Care Coverage Plan, 12 F.Supp.2d 535, 537 (W.D. Va. 1998) ("The fact that the court remanded the plaintiff's request for benefits does not prohibit her status as a 'prevailing party.'").

Further, the Seventh Circuit, in Quinn v. Blue Cross & Blue Shield, 161 F.3d 472, 479 (7th Cir. 1998), in remanding a claim to the ERISA plan administrator for further review, noted that "[s]hould Quinn ultimately succeed in her claim and be awarded benefits, she will then have the benefit, as the prevailing party, of the modest presumption that she is entitled to reasonable attorney's fees." Id. Although dicta, the court was recognizing the possibility that the plaintiff could be a "prevailing party" if she was awarded benefits by the administrator on remand. See also Soltysiak v. Unum Provident Corp., 480 F.Supp.2d 970, 974 (W.D. Mich. 2007) (holding that a plaintiff is a prevailing party eligible for attorneys' fees where the claim had been remanded to the defendant with instructions to adequately consider all of the evidence).

Indeed, in remanding the claim to the defendant, the court indicated:

> Based on the record described above, this Court finds compelling evidence

> that Ms. Hardt is totally disabled due to her neuropathy. However, this is not the end of the inquiry. The Court must decide whether the evidence is so overwhelming that Ms. Hardt is entitled to judgment as a matter of law. While the Court is inclined to rule in Ms. Hardt's favor, it would be unwise to take this step without first giving Reliance the chance to address the deficiencies in its approach. The record demonstrates that Ms. Hardt did not get the kind of review to which she was entitled under applicable law.

Opinion and Order of March 27, 2008, at 18-19. Thus, the court sanctioned a material change in the legal relationship of the parties by ordering the defendant to conduct the type of review to which the plaintiff was entitled. In light of the fact that, on remand, the plaintiff received precisely the benefits she had sought, she meets the definition of a "prevailing party" and is eligible for an award of attorneys' fees.

B. Propriety of Attorneys' Fees

Having found that the plaintiff is a "prevailing party," the court turns next to the Quesinberry factors to determine whether she is entitled to recover attorneys' fees from the defendant in this matter. In considering these factors, most of which weigh in favor of the plaintiff, the court concludes that she is entitled to recover at least some of her attorneys' fees in litigating the matter. Turning to

the first Quesinberry factor, the defendant's degree of bad faith or culpability, the record is replete with instances of the defendant's staunch opposition to awarding any benefits to the plaintiff. While staunch opposition is not in and of itself evidence of bad faith, the totality of circumstances seems to indicate that it was the defendant's goal from the beginning to deny the plaintiff the benefits she had claimed, and that, to further that goal, the defendant engaged in only the most cursory review of the medical evidence.[7] With the (not insignificant) exception of actually awarding her benefits on remand, the defendant has opposed the plaintiff's position throughout the course of this litigation. And even when the defendant did award the plaintiff the benefits she sought, it was only after having been ordered by the court to provide the kind of meaningful review of the evidence to which the plaintiff was entitled by law. Thus, the bad faith and culpability of the defendant in ignoring the medical evidence of the plaintiff's disability weigh in favor of an award of attorneys' fees to the plaintiff.

With respect to the ability of the defendant to pay an award of fees, the defendant has

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[7] The court, noting that the defendant had relied almost completely on the opinion of Dr. Leibowitz, found serious flaws in Dr. Leibowitz's methodology, noting that his medical conclusions were "extremely vague and conclusory" and that he "failed to cite to any medical evidence to support his conclusion," and instead offered conclusions on symptoms of which the plaintiff had never complained. Opinion and Order of March 27, 2008, at 13-14. The court further held that the defendant had arbitrarily ignored the findings of the plaintiff's treating physicians, instead crediting Dr Leibowitz's report, a report which also ignored those findings.

acknowledged such, and therefore this factor weighs in favor of granting the plaintiff's motion. As to whether such an award would constitute a deterrent, the court finds that this factor, too, weighs in favor of the plaintiff, as it would deter similarly-situated defendants from failing to consider the full breadth of medical evidence available to them when reviewing a claim for benefits. Although the plaintiff claims that, by filing the instant lawsuit, she sought to resolve a significant legal question regarding ERISA itself, the facts demonstrate that the case was merely regarding the defendant's denial of benefits to the plaintiff and her attempt to have that decision reversed. Although the issue arose in the context of what constitutes a proper review of the evidence, the court did not decide "whether a plan administrator can shield itself with the claim that there were conflicting medical reports when, in fact, the administrator chose to rely virtually exclusively on the conclusions of a peer reviewer who has not personally examined the claimant while completely [sic] the conclusions of the claimant's own treating physicians and other evidence presented by the claimant." Brief in Support of Motion for Attorneys' Fees, at 6-7. Thus, this factor weighs against the imposition of the plaintiff's attorneys' fees against the defendant.[8]

With respect to the fifth of the Quesinberry factors, the plaintiff's position clearly has the higher relative merit, as demonstrated in the court's

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[8] The plaintiff also claims that the award of fees may benefit other plan participants, but fails to allege that she has "sought to benefit all participants." Quesinberry, 987 F.2d at 1029.

remand order and-more importantly-the ultimate resolution of the case. As the court noted, "it is clear that Reliance's decision to deny Ms. Hardt long-term disability benefits was not based on substantial evidence." Opinion and Order of March 27, 2008, at 17-18. Accordingly, this factor also weighs in favor of granting the plaintiff an award of fees. Considering the factors outlined in Quesinberry, as well as the totality of this case, the court finds that a discretionary award of fees in favor of the plaintiff is appropriate.

C. Reasonableness of Fees Requested

Having found that the plaintiff is both a "prevailing party" and that the Quesinberry factors support an award of fees, the court must now determine whether the fees requested by the plaintiff, a total of $58,920.73, are reasonable. The plaintiff has provided an affidavit from Ann K. Sullivan, an attorney at the law firm of Crenshaw, Ware & Martin, which represented her throughout the course of this litigation. See Brief in Support of Motion for Attorneys' Fees, Exhibit A (hereinafter "Sullivan Affidavit"). Also attached is a breakdown of the billable hours worked by the attorneys and paralegals on the plaintiff's behalf. See Sullivan Affidavit, Exhibit 3. According to that breakdown, Ann K. Sullivan, who served as lead counsel on the matter, worked a total of 54.4 hours at the time of filing, and expected to work an additional 10.0 hours on the remainder of the case. Ms. Sullivan bills at a rate of $275.00 per hour. Elaine K. Inman is the other attorney at Crenshaw, Ware & Martin who worked on the plaintiff's case. She worked a total of

171.7 hours and anticipated that she would work an additional 4.0 hours on the remainder of the case. Ms. Inman bills at the hourly rate of $200 per hour. In addition, four paralegals provided work on the plaintiff's case at various points. Lori K. Krezel, Suzi C. North, Debbie S. Grimm, and Christine M. Jordan worked a combined total of 62.2 hours, and billed at an hourly rate of $95 per hour.

Although the court finds that the hourly rates billed by the attorneys and paralegals are appropriate considering their experience, it also finds that the total number of hours billed by the plaintiff's attorneys and their paralegals is excessive, in light of the straightforward nature of the case and various points at which the case was "overlawyered." Specifically, both Ms. Inman and Ms. Sullivan attended the Rule 26(f) scheduling conference on April 26, 2007 and a discovery dispute conference on June 26, 2007. Both attorneys billed time in preparation for arguing their cross-motions for summary judgment, and indeed both attorneys attended the hearing, although only Ms. Sullivan actually argued at the hearing. Finally, it is noted that, although the plaintiff's attorneys have submitted documentation regarding anticipated time spent at oral argument on her motion for attorneys' fees, the court has found that argument on this motion is not necessary. Given these issues, the court finds it appropriate to eliminate the hours billed by Ms. Inman with regard to the April 26 and June 26, 2007 conferences, the hours billed by Ms. Inman on September 14, 17, and 19, 2007 with regard to the hearing on the motions for summary judgment, and the hours billed by both Ms. Sullivan

and Ms. Inman in relation to an anticipated hearing on the instant motion for attorneys' fees. Further, the court finds excessive the number of hours billed in relation to discovery requests, as discovery in ERISA cases is ordinarily straightforward and limited to the evidence before the plan administrator at the time of its decision. See, e.g., Elliott v. Sara Lee Corp., 190 F.3d 601, 608-09 (4th Cir. 1999).[9] Although the court did authorize the plaintiff to request additional discovery, it believes that the amount of hours spent by the plaintiff's attorney with regard to discovery matters is excessive, and that the time spent on May 1-3 and June 29, 2007, by Ms. Inman regarding drafting correspondence to the court concerning discovery, should be eliminated. Accordingly, the court will reduce Ms. Imnan's billed hours by 19 hours and Ms. Sullivan's billed hours by 2.0 hours.

More significantly, however, the court finds that the total number of hours billed on this matter are excessive, in light of the nature of the case, the results obtained, and the experience of the plaintiff's attorneys in handling such cases. Specifically, the evidence presented to the court by the plaintiff indicates that Ms. Inman, who has billed a total of $35,140-nearly 60% of the attorneys' fees requested-appears to have little, if any, experience in ERISA matters.[10] Although her biography from her law

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[9] It is true that the court permitted a limited amount of discovery, as agreed to by the parties and memorialized in the Rule 16(b) scheduling order. However, the plaintiff's repeated motions with regard to discovery were denied by the court.

[10] Despite ample opportunity to provide the court with evidence of Ms. Inman's relevant experience in ERISA

firm's website indicates that she handles "a wide range of civil litigation matters," it fails to mention any prior work in ERISA cases,[11] and in fact indicates that, prior to her practice with the firm of Crenshaw, Ware & Martin, Ms. Inman served as an assistant public defender, a position that undoubtedly did not involve ERISA matters.[12] See Sullivan Affidavit, Exhibit 2. And it is noteworthy that, although Ms. Sullivan's affidavit touts her experience with ERISA matters, it fails to mention any relevant experience in such cases possessed by Ms. Inman.[13] While Ms, Inman bills at a lower rate than Ms. Sullivan, the court believes that Ms. Inman's apparent inexperience with ERISA matters

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litigation, the plaintiff has failed to do so, instead claiming only that "Ms. Inman has been practicing for six years and has handled multiple cases in federal court and has focused primarily on labor and employment law since joining Crenshaw, Ware & Martin, P.L.C." Plaintiff's Rebuttal Brief, at 10.

[11] In contrast, Ms. Sullivan's firm biography clearly mentions her ERISA experience, and notes that she was named in the 2007 Edition of Virginia Super Lawyers with respect to "employee benefits/ERISA." See Sullivan Affidavit, Exhibit 1.

[12] The Sullivan Affidavit indicates that Ms. Inman joined the firm of Crenshaw, Ware & Martin in 2006. See Sullivan Affidavit, at ¶ 9.

[13] This is true to an even greater extent in the Mapp Affidavit, which makes no attestation as to the skill or experience of Ms. Inman. See Plaintiff's Rebuttal Brief, Exhibit A. Further, the Mapp Affidavit fails to indicate whether the affiant believes that the number of hours spent on the case by the attorneys for the plaintiff is reasonable, and in fact appears incorrect in asserting that "the case is fully litigated."

contributed significantly to an increase in the fees charged to the plaintiff.

Thus, the court finds it appropriate to reduce Ms. Inman's billed hours total by 50%. After the reduction of 19 hours as explained above, her total number of hours stands at 156.7. A reduction of 50% brings Ms. Inman's total hours to 78.35. At a rate of $200 per hour, the plaintiff is entitled to an award of $15,670.00 with respect to Ms. Inman's time. With respect to Ms. Sullivan's time, the court has reduced her billed hours to 62.4, and at a rate of $275, the plaintiff is entitled to an award of $17,160.00 with respect to Ms. Sullivan's work. The work of the four paralegals involved in this matter on the plaintiff's behalf entitles the plaintiff to an award of $5,909.00. Accordingly, the plaintiff is entitled to an award of attorneys' fees in the total amount of $38,739.00.[14]

D. Costs

The plaintiff, having prematurely filed a bill of costs, has now requested that the document be renewed. From the face of the bill, it is not apparent whether the plaintiff is seeking costs under the same ERISA statute that authorizes attorneys' fees, 29 U.S.C. § 1132(g), or under the more general cost-shifting provision of Rule 54(d)(1) of the Federal Rules of Civil Procedure. However, as indicated

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[14] The billing statement submitted by the plaintiff indicates additional expenses that total $161.73, but appear to be in the nature of costs, not attorneys' fees. It is not clear to the court whether these expenses are incorporated or duplicated in the bill of costs submitted by the plaintiff, and therefore the court declines to order them reimbursed with respect to the motion for attorneys' fees.

supra, courts have inferred a "prevailing party" requirement into the terms of 29 U.S.C. § 1132(g), and Rule 54(d)(1) by its explicit terms requires "prevailing party" status as a prerequisite to recovery of costs. Because the court finds that the plaintiff is a prevailing party, she is entitled to recover her costs, and therefore the court awards her costs in the amount of $410.00, as indicated in the bill of costs.

IV. Conclusion

As set forth fully above, the court finds that the plaintiff is entitled to an award of attorneys' fees and costs and therefore that her motion is **GRANTED**. The court finds that a reasonable award of fees is as follows: $32,830.00 in attorneys' fees, $5,909.00 in paralegal fees, and $410.00 in costs. The total award is $39,149.00, and judgment in this amount is hereby entered in favor of the plaintiff at the expense of the defendant. It appearing to the court that no further legal issues remain to be resolved in this matter, the case is **DISMISSED**.

The Clerk is **REQUESTED** to send a copy of this Order to the counsel of record for all parties.

It is so **ORDERED**.

/s/
UNITED STATES DISTRICT JUDGE

August 7, 2008
Norfolk, Virginia

[ENTERED: MARCH 27, 2008]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

BRIDGET HARDT,

Plaintiff,

v. **Civil Action No. 2:07cv105**

RELIANCE STANDARD LIFE INSURANCE CO., et al.,

Defendants.

OPINION AND ORDER

Plaintiff Bridget Hardt brought this action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., alleging that Defendant Reliance Standard Life Insurance Company's ("Reliance") denial of her claim for long-term disability benefits was not supported by substantial evidence. For the reasons set forth below, the parties' Cross-Motions for Summary Judgment (Docket Nos. 19, 31) are **DENIED**, and the case is **REMANDED** for further review.

I. Facts and Procedural History

Dan River Inc. ("Dan River") is a textile manufacturer that provides benefits to qualified

participants in its Group Long-Term Disability Insurance Program Plan ("the Plan"). Dan River administers the Plan, and Reliance serves the dual roles of deciding whether a claimant is entitled to benefits and paying for such benefits.

In 2000, Bridget Hardt, an executive assistant to the president of Dan River, began experiencing pain in her neck and shoulders. After seeing several doctors, Ms. Hardt was diagnosed with carpal tunnel syndrome ("CTS"). She underwent surgery on both of her wrists, yet she still suffered from pain. She stopped working on January 23, 2003.

In or about August 2003, Ms. Hardt requested that Reliance pay her long-term disability benefits pursuant to the Plan. Ms. Hardt explained in her claim form that she suffered from numbness, tingling, loss of feeling, and extreme pain in her arms, hands, shoulders, and neck. Reliance provisionally approved her claim, but notified Ms. Hardt that she was required to submit to a functional capacities evaluation ("FCE").

On October 13, 2003, Hand Rehabilitation of Hampton Roads conducted the FCE to assess the impact of Ms. Hardt's CTS and neck pain on her ability to work. The evaluator summarized Ms. Hardt's pertinent medical history as including pain in her neck, left shoulder, parathesias on both hands, and CTS. The evaluator further noted that Ms. Hardt's other previous medical problems included lower back pain, hypertension, and anxiety.

The evaluator ultimately concluded that Ms. Hardt suffered from major limitations in moving her neck, upper extremity pain, decreased right hand dexterity and strength, restricted overhead reach, a restricted ability to squat and kneel, the inability to crawl or to climb ladders, as well as decreased lift, carrying, and push and pull capabilities. The evaluator nonetheless found that Ms. Hardt could perform a sedentary level of work and lift 4 to 5 pounds on occasion with her right hand, and 2 to 3 pounds on a frequent basis. Based on these findings, Reliance denied Ms. Hardt benefits in December 2003. Upon considering Ms. Hardt's administrative appeal, Reliance reversed its decision somewhat and agreed to provide disability benefits for twenty-four months based on Ms. Hardt's inability to perform her current position.

While Ms. Hardt was being evaluated, one of her treating physicians, Gilbert M. Snider, M.D., diagnosed Ms. Hardt with another condition - hereditary small-fiber neuropathy.[1] Ms. Hardt had recently developed a tingling and numbness in her lower extremities that resulted in an icy-hot sensation. During a neurological exam, Dr. Snider found that Ms. Hardt had to keep her fingers mildly flexed because it hurt to fully extend them, that manipulation of the hands and feet during the examination was unpleasant, and that her motor skills were somewhat limited by pain. He opined

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[1] Small-fiber neuropathy is a disorder involving small sensory cutaneous nerves (Pl.'s Mem. in Opp'n to Def.'s Mot. For Summ. J. 2.) Symptoms include tingling, numbness, burning pain or extreme coldness, brief, painful sensations, and loss of temperature sensation. Id.

that there could be symmetric distal weakness in the lower extremities, but that a detailed examination was difficult due to pain. He concluded that "[t]he painful nature and involvement of pain sensation [indicated that Ms. Hardt suffered from] small-fiber neuropathy," but that it may not show up in nerve conduction studies. (AR 460.)[2]

Ms. Hardt's pain became worse over the following months. In a follow-up visit, Dr. Snider noted that Ms. Hardt had experienced some relief by taking 800 milligrams of Neurontin three times a day, but she continued to have obvious pain and constantly stomped her feet. He recommended increasing her pain medication. The following month, Dr. Snider recommended increasing Ms. Hardt's dosage yet again because she continued to have a burning sensation in her feet during the night. Two months later, Dr. Snider noted that Ms. Hardt was not doing well. Although her prescription for Neurontin had doubled, it was not clear that the increased dosage was providing additional relief. Further, the neuropathy caused Ms. Hardt difficulty while walking, and she had a "burning sensation in the feet all the way to the ankles and pain and cramping to the upper 1/3 of her cal[ves]. . . . [H]er

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[2] Ms. Hardt asserts in Plaintiff's Objection to Defendant's Notice of Filing of Administrative Record and Brief in Support Thereof (Docket No. 24) that the administrative record is not complete because it lacks the Claims Department Administrative Procedures Manual. However, the language in the manual is clear that the steps identified are guidelines and may not apply to every claim. Thus, the failure to abide by the document or include it in the administrative record does not affect the outcome of the decision. For this reason, Ms. Hardt's objection is denied and the manual is excluded.

feet [were] swollen and it [was] clumsy [for her] to walk on them." (AR 437.)

While Ms. Hardt was receiving treatment for neuropathy, she applied to the Social Security Administration ("SSA") for disability benefits. In conjunction with this request, she submitted questionnaires completed by her treating physicians, Julius S. Miller, M.D., and Dr. Snider. Dr. Miller concluded that Ms. Hardt could not return to gainful employment in her prior position or other sedentary positions because of her neuropathy, combined with her other ailments. He stated that Ms. Hardt would experience "pain or other symptoms severe enough to interfere with attention and concentration . . . [c]onstantly" (AR 416), that she had limitations on her ability to walk, sit, or stand due to her impairments, and that Ms. Hardt would have difficulty working at a regular job on a sustained basis (AR 415).

Dr. Snider's SSA questionnaire similarly stated that Ms. Hardt would have difficulty working at a regular job on a sustained basis. (AR 432.) He opined that Ms. Hardt's disability would cause her to miss work more than three times a month, placed limitations on her ability to walk, sit, and stand, and that she experienced "pain or other symptoms severe enough to interfere with attention and concentration . . . frequently." (AR 432-33.) Both doctors also found that Ms. Hardt was not a malingerer. (AR 415, 431.) The SSA determined that Ms. Hardt was "disabled" as defined under the Social Security Act because it was impossible for her to return to her former

employment or make an adjustment to perform other work. (AR 74.)

A few months after Ms. Hardt received Social Security disability benefits, Reliance notified her that it would terminate her benefits upon expiration of the twenty-four month period. Under the terms of the Plan, Ms. Hardt did not qualify for benefits after twenty-four months unless she was totally disabled from all occupations. Reliance found that Ms. Hardt was not totally disabled from CTS since her magnetic resonance image ("MRI") and electromyogram ("EMG") were both negative. They also noted that the FCE conducted in 2003 demonstrated that she had sedentary restrictions, but that she could perform a sedentary job.

Once again, Ms. Hardt administratively appealed Reliance's decision. In connection with her appeal, Ms. Hardt submitted all of her medical records, the SSA questionnaires completed by Drs. Miller and Snider, as well as an updated questionnaire from Dr. Miller in which he again opined that Ms. Hardt was not a malingerer and would have difficulty working at a regular job on a sustained basis. Before ruling on the appeal, Reliance decided to obtain an updated FCE to determine whether Ms. Hardt had CTS or neck pain. Although Reliance knew that Ms. Hardt had been diagnosed with neuropathy in 2004, Reliance did not mention neuropathy or neuropathic pain in its referral request to the testing company.

Ms. Hardt appeared for a FCE on December 29, 2005. The results of the examination were found

to be invalid because Ms. Hardt's effort was submaximal. A second evaluation was scheduled for January 26, 2006, but the results of that evaluation were also found to be invalid for similar reasons. The first evaluator noted that Ms. Hardt "refused multiple tests . . . for fear of nausea/illness/further pain complaints." (AR 48.)

Neither of the inconclusive FCEs were able to support a decision to deny benefits. Rather than have a doctor personally examine Ms. Hardt, Reliance decided to hire a doctor to review some, but not all, of her medical records. The reviewing physician, Michael Leibowitz, M.D., found that Ms. Hardt's prognosis for CTS, neck pain, and neuropathy were either excellent or fair to good. He concluded that Ms. Hardt underwent successful bilateral carpal tunnel release surgery and no longer had any electrophysiological evidence of entrapment of the median nerves at the carpal tunnels. Dr. Leibowitz also concluded that the prognosis for Ms. Hardt's cervical sprain and strain was good, and that he expected to see improvement in her symptoms over time if she complied with a home exercise program and ergonomic interventions. Finally, Dr. Leibowitz opined that the prognosis for Ms. Hardt's neuropathy was fair to good since she did not suffer from the autonomic nervous component of hereditary small-fiber neuropathy.

Dr. Leibowitz failed to address in his report any of the pain medications prescribed to Ms. Hardt or the effect that her pain had on her ability to perform a job. It is also unclear whether Dr. Leibowitz reviewed the questionnaires completed by

Drs. Miller and Snider in which they opined that Ms. Hardt was completely disabled from her conditions. Dr. Leibowitz did not mention any of the questionnaires in his report.

In addition to the peer review performed by Dr. Leibowitz, Reliance had a vocational rehabilitation counselor perform an evaluation to determine what jobs, if any, Ms. Hardt could perform. Based on the results of a residual employability analysis that was performed in 2003, which was based on the FCE performed in 2003, the counselor conducted a labor market study. The study identified eight employment opportunities Ms. Hardt could perform.

By letter dated March 27, 2006, Reliance advised Ms. Hardt that it had completed its review of her claim file and found that its decision to terminate benefits was correct. Reliance based its decision on the FCEs, the peer review report by Dr. Leibowitz, and the labor market study.

After exhausting her administrative remedies, Ms. Hardt filed this action in the United States District Court for the Eastern District of Virginia, alleging that Reliance violated ERISA by wrongfully denying her long-term disability benefits.

II. Analysis

A. Standards of Review

1. Cross Motions for Summary Judgment

Summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where both parties have moved for summary judgment, a court should consider "each motion separately on its own merits to determine whether either of the parties deserves judgment as a matter of law." Rossignol v. Voorhaar, 316 F.3d 516, 523 (4th. Cir. 2003) (citation omitted). For each motion, "the court must take care to 'resolve all factual disputes and any competing, rational inferences in the light most favorable' to the party opposing that motion." Id. (quoting Wightman v. Springfield Terminal Ry. Co., 100 F.3d 228, 230 (1st Cir. 1996)). The party who bears the burden of proof on an issue at trial, however, cannot survive summary judgment without forecasting evidence sufficient to sustain his or her burden of proof on that point. Celotex, 477 U.S. at 327.

2. ERISA Standard of Review

This Court already ruled in Hardt v. Reliance Standard Life Insurance Co., 494 F. Supp. 2d 391 (E.D. Va. 2007), that it would review Reliance's denial of long-term disability benefits under a modified abuse of discretion standard of review. Id. at 392. This standard is necessary to compensate for

the effect of any potential conflict that may arise due to Reliance's dual role as claims reviewer and policy insurer. Id. at 393. The modified standard deviates from the usual abuse of discretion review "only to the extent necessary to counteract any influence unduly resulting from the conflict [of interest]." Ellis v. Metro. Life Ins. Co., 126 F.3d 228, 233 (4th Cir. 1997). "The more incentive for the administrator or fiduciary to benefit itself by a certain interpretation of benefit eligibility or other plan terms, the more objectively reasonable the administrator or fiduciary's decision must be and the more substantial the evidence must be to support it." Id.

When reviewing the discretionary decision of a plan administrator to deny employee benefits, "judicial review . . . is limited to the body of evidence before the administrator at the time it rejected [the] claim." Donnell v. Metro. Life Ins. Co., 165 F. App'x. 288, 294 (4th Cir. 2006) (citing Elliott v. Sara Lee Corp., 190 F.3d 601, 608-09 (4th Cir. 1999)). The "administrator's decision will not be disturbed if it 'is the result of a deliberate, principled reasoning process and if it is supported by substantial evidence.'" Elliott, 190 F.3d at 605 (quoting Brogan v. Holland, 105 F.3d 158, 161 (4th Cir. 1997)).

Substantial evidence is evidence that "a reasoning mind would accept as sufficient to support a particular conclusion." Donnell, 165 F. App'x. at 295 (quoting LeFebre v. Westinghouse Elec. Corp., 747 F.2d 197, 208 (4th Cir. 1984)). It consists of "more than a scintilla but less than a preponderance." Id. However, a decision to deny benefits is neither reasonable nor supported by

substantial evidence if an administrator fails to fully consider all ailments affecting the claimant and properly assess their impact. See Guthrie v. Nat'l Rural Elec. Coop. Ass'n Long-Term Disability Plan, 509 F.3d 644, 651-52 (4th Cir. 2007).

To determine whether an administrator's decision was reasonable and based on substantial evidence, the United States Court of Appeals for the Fourth Circuit has formulated a nonexhaustive list of eight factors that a court may consider. Booth v. Wal-Mart Stores, Inc. Assoc. Health & Welfare Plan, 201 F.3d 335, 342-43 (4th Cir. 2000) (including the language of the plan, whether the decision making process was reasoned and principled, the adequacy of the materials considered to make the decision, and the degree to which they support it). The relevant factors in this case are the adequacy of the materials considered and whether Reliance's decision was the result of a deliberate, principled, and reasoned process.

B. Reliance's Motion for Summary Judgment[3]

Reliance asserts that the Court should grant summary judgment in its favor because it did not abuse its discretion when it concluded Ms. Hardt was not totally disabled. In its letter to Ms. Hardt dated March 27, 2006, Reliance outlined the information upon which it relied to deny her claim:

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[3] Ms. Hardt filed a Motion to Strike Defendant's Motion for Summary Judgment and Brief in Support Thereof (Docket No. 25) asserting that Reliance failed to comply with local rules. The Court will assess the case on its merits. Thus, the motion is denied.

- a FCE performed on October 13, 2003;
- a FCE performed on December 29, 2005;
- a FCE performed on January 26, 2006;
- a peer review performed by Dr. Michael Leibowitz on March 4, 2006; and
- a vocational evaluation performed on March 10, 2006.

(Mem. of Law in Support of Def.'s Mot. For Summ. J. 3-6.) This listing makes it clear that Reliance's decision to deny benefits was based on incomplete information. None of the FCEs assessed the impact of neuropathy and neuropathic pain on Ms. Hardt. Moreover, Dr. Leibowitz's report was itself incomplete.

First, the basis for Dr. Leibowitz's medical conclusions is extremely vague and conclusory. Without addressing any of the medical records that reflect Ms. Hardt's severe pain, the increasingly strong pain medications prescribed to her, or her decreasing ability to walk, Dr. Leibowitz concluded that the prognosis for her neuropathy was fair to good. Strikingly, he spent a substantial majority of the diagnosis portion of his report discussing Ms.

Hardt's CTS and cervical sprain.[4] He addressed Ms. Hardt's prognosis for neuropathy in only a cursory manner.

In addition, Dr. Leibowitz failed to cite to any medical evidence to support his conclusion. He merely noted that Ms. Hardt does not suffer from an "autonomic nervous system component." (AR 357.) However, this seems to be a red herring, since Dr. Snider never stated that Ms. Hardt suffered from autonomic symptoms. Autonomic symptoms "include such symptoms as bladder and bowel control problems, blood pressure regulation problems and difficulty with sexual function." (Pl.'s Mem. In Opp'n to Def.'s Mot. for Summ. J. 23.) Dr. Snider instead diagnosed Ms. Hardt with neuropathy and neuropathic pain. As stated previously, the symptoms of these ailments include tingling, numbness, burning pain or extreme coldness, brief, painful sensations, and loss of temperature sensation. See supra note 1. Dr. Leibowitz mentioned these symptoms in his summary of relevant medical records, yet he made no analysis of them in his diagnosis or prognosis.

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[4] The information in the record is mixed regarding Ms. Hardt's recovery from CTS. Dr. Snider found that Ms. Hardt's surgery on her left and right wrists had provided limited, if any, benefit. However, he also reported that there had been improvement in the right median sensory amplitudes and the right median motor distal latency indicating successful release of the median nerve in the carpal tunnel.

Given the conflicting reports, it was within Reliance's discretion to deny the claim based on CTS and neck pain only. Booth, 201 F.3d at 345 ("Confronted with this record of conflicting opinion, . . . it is not an abuse of discretion for a plan fiduciary to deny . . . benefits where conflicting medical reports were presented." (quoting Elliott, 190 F.3d at 606)).

As the Fourth Circuit explained in Guthrie, 509 F.3d at 651-52, an administrator's denial of benefits is unreasonable if the administrator fails to consider all conditions from which the plaintiff suffers. In Guthrie, the administrator found that the plaintiff was not disabled due to occupational asthma based on the reports of two pulmonologists. Id. at 652. Yet, the administrator failed to consider the "multiple other problems" from which the plaintiff suffered that neither doctor addressed. Id. The court held the administrator's decision was 15 unreasonable. Id. at 651-52.

Dr. Leibowitz's report is further inadequate because he failed to address the treating physicians' contradictory medical findings. Reliance does not have to give special weight to Ms. Hardt's treating physicians' conclusions; however, Reliance "may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of . . . treating physician[s]." Black and Decker Disability Plan v. Nord, 538 U.S. 822, 834 (2003). Both of Ms. Hardt's doctors concluded that she was completely disabled, yet Reliance ignored these findings and gave them no weight at all in its decision. Reliance instead relied most significantly on Dr. Leibowitz's report - a report that studiously ignored the diagnoses of these physicians.

Reliance correctly notes that an administrator does not act unreasonably by denying benefits if the record contains "conflicting medical reports." Elliott, 190 F.3d at 606. However, the contradictory evidence must be substantial. Stup v. Unum Life Ins. Co. of Am., 390 F.3d 301, 308 (4th Cir. 2004). Dr.

Leibowitz's conclusory and incomplete report does not meet the quantum of evidence that "a reasoning mind would accept as sufficient to support a particular conclusion." Donnell, 165 F. App'x. at 295. "[A]n administrator operating under a conflict of interest does not act reasonably in denying benefits if faced, on the one hand, with substantial evidence of disability and, on the other, with only tentative and ambiguous evidence that might, or might not, favor denial of benefits." Stup, 390 F.3d at 309.

In addition to relying on an incomplete record, Reliance's decision to deny benefits was also inadequate because it improperly rejected much of the evidence that Ms. Hardt submitted. Reliance found that there was "no support in the medical records for Plaintiff's claim of total disability based on small-fiber neuropathy," (Def.'s Combined Resp. to Pl.'s Mot. for Summ. J. and Rep. in Supp. of Def's Mot. 5), because the diagnosis was based on subjective complaints of pain. Id. at 9.

Reliance wrongly rejected Ms. Hardt's evidence of pain. As explained in Wasson v. Media Gen., Inc., 446 F. Supp. 2d 579, 599 (E.D. Va. 2006) (Payne, J.), the Fourth Circuit does not require that objective evidence be in the form of "an MRI, X-ray or some other tangible or physical demonstration of disability." Although "the professional opinions of doctors, based on physical examination of a patient and the related observations . . . are not the same kind of objective evidence as a CT scan or an MRI, they certainly are objective evidence in the form of medical opinion based on first hand observation." Id. at 594 (citation omitted); see also Hines v.

Barnhardt, 453 F.3d 559, 564-66 (4th Cir. 2006)(holding that social security disability applicants may rely exclusively on subjective complaints of pain if diagnosed with a condition that is reasonably likely to cause chronic or acute pain).

Reliance further ignored the substantial amount of pain medication Ms. Hardt's treating physicians had prescribed to her. As explained in Wasson, the medical decision to prescribe pain medication is objective evidence of a painful condition absent proof otherwise.

> While over-medication and fraudulent medication may be a serious and real problem today, there is absolutely no evidence in this matter that [the claimant's] prescriptions result from fraud or over-zealous prescribing physicians. Absent any such evidence, this Court and the [administrator] must accept that [the claimant's] physicians prescribed these drugs because they reasonably believed that [the claimant] suffers from debilitating pain. Those medical decisions and the prescriptions are objective evidence of [the claimant's] painful condition.

Id. at 595. Similar to the claimant in Wasson, there is objective evidence, based upon professional medical opinions and prescriptions for numerous pain medications, that Ms. Hardt suffers from neuropathy and is totally disabled.

Finally, the vocational report lacks probative value because it was based on an outdated FCE that, once again, failed to assess Ms. Hardt's neuropathic pain. "[I]n order for a vocational expert's opinion to be relevant or helpful, it must be based upon a consideration of all other evidence in the record . . . ." Hines, 453 F.3d at 561 (quoting Walker v. Bowen, 889 F.2d 47, 50 (4th Cir. 1989).

In summary, it is clear that Reliance's decision to deny Ms. Hardt long-term disability benefits was not based on substantial evidence. The FCEs did not assess the impact of Ms. Hardt's neuropathy or neuropathic pain on her ability to perform a sedentary job. The peer review report was incomplete and inadequate. The vocational report was based on outdated information. Further, Reliance failed to consider medical records submitted by Ms. Hardt that demonstrated she was suffering from neuropathy. For these reasons, Reliance's motion for summary judgment is denied.

C. Ms. Hardt's Motion for Summary Judgment

Ms. Hardt has also moved for summary judgment based on her claim that Reliance's decision to deny her long-term disability benefits is unreasonable. In essence, Ms. Hardt claims that the medical records, physician questionnaires, and SSA

findings[5] are overwhelming evidence that she is totally disabled due to CTS and neuropathy.

Based on the record described above, this Court finds compelling evidence that Ms. Hardt is totally disabled due to her neuropathy. However, this is not the end of the inquiry. The Court must decide whether the evidence is so overwhelming that Ms. Hardt is entitled to judgment as a matter of law. While the Court is inclined to rule in Ms. Hardt's favor, it would be unwise to take this step without first giving Reliance the chance to address the deficiencies in its approach. The record demonstrates that Ms. Hardt did not get the kind of review to which she was entitled under applicable law.

It is for this reason that the Court remands this case back to Reliance to fully and adequately assess Ms. Hardt's claim. This case presents one of those scenarios where the plan administrator has failed to comply with the ERISA guidelines and the "proper course of action is to remand to the plan administrator for a 'full and fair review.'" Weaver v. Phoenix Home Life Mut. Ins. Co., 990 F.2d 154, 159 (4th Cir. 1993) (citing Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1007 n.4 (4th Cir. 1985)).

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[5] As acknowledged in the Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, the SSA award of disability benefits is not binding on plan administrators. Also, because the Court finds that there is persuasive evidence that Ms. Hardt suffers from a disability without considering the SSA's decision, it does not factor into the Court's determination.

III. Conclusion

For the aforementioned reasons, the Court **DENIES** Defendant's Motion for Summary Judgment (Docket No. 19), **DENIES** Plaintiff's Motion for Summary Judgment (Docket No 31), **REMANDS** this matter to Reliance, and **INSTRUCTS** Reliance to act on Ms. Hardt's application by adequately considering all the evidence discussed within this Opinion within thirty (30) days of its date of issuance. Otherwise, judgment will be issued in favor of Ms. Hardt.

The Clerk is **DIRECTED** to send a copy of this Opinion and Order to all counsel of record.

IT IS SO ORDERED.

/s/
Walter D. Kelley, Jr.
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
March 27, 2008

[ENTERED: AUGUST 10, 2009]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1896
(2:07-cv-00105-JBF-JEB)

BRIDGET HARDT,

Plaintiff - Appellee

v.

RELIANCE STANDARD LIFE INSURANCE COMPANY,

Defendant - Appellant

and

DAN RIVER GROUP LONG-TERM DISABILITY PLAN,

Defendant

ORDER

This Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson and Senior District Judge Faber.

For the Court

/s/ Patricia S. Connor, Clerk

29 U.S.C. §1132(g)

Section 502(g) of ERISA provides:

> **g) Attorney's fees and costs; awards in actions involving delinquent contributions**
>
> (1) In any action under this subchapter (other than an action described in paragraph 2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of the action to either party.
>
> (2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 in which a judgment in favor of the plan is awarded, the court shall award the plan—
>
> (A) the unpaid contributions,
>
> (B) interest on the unpaid contributions,
>
> (C) an amount equal to the greater of—
>
> (i) interest on the unpaid contributions, or
>
> (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),
>
> (D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and
>
> (E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1986

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
DEC 16 2009
OFFICE OF THE CLERK

No. 09-448

In The
Supreme Court of the United States

BRIDGET HARDT,

Petitioner,

v.

RELIANCE STANDARD LIFE INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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CORPORATE DISCLOSURE STATEMENT

Respondent Reliance Standard Life Insurance Company hereby discloses that it is a subsidiary of Reliance Standard Life Insurance Company of Texas, which in turn is a subsidiary of Delphi Financial Group, Inc., which is a publicly held corporation.

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INTRODUCTION

Petitioner is asking this Court to review an unpublished decision of the United States Court of Appeals for the Fourth Circuit which denied her request for attorney's fees. As her primary argument, Petitioner states that certiorari should be granted based on a split in the circuits on whether prevailing party status is required for an award of attorney's fees under § 502(g) of the ERISA statute.[1] For many reasons, this issue does not satisfy the considerations stated in Supreme Court Rule 10 regarding the grant of a petition for a writ of certiorari.

First and foremost, Petitioner's brief overlooks this Court's decision in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 89 n.14 (1982). There, the Supreme Court addressed fee awards under the ERISA statute. The Court recognized that in an ERISA action, "attorney's fees are normally awarded only to prevailing parties...." *Id.* There is no reason for the Court to re-visit the issue.

The petition should also be denied because there is no actual split in authority in the various circuits. This is not surprising based on the Supreme Court's pronouncement in *Kaiser Steel*. To the extent that a circuit may have strayed from the holding in *Kaiser Steel*, this still would not justify granting the petition. As stated in Supreme Court Rule 10, "the misapplication of a properly stated rule of law" will "rarely" justify the grant of a petition for a writ of certiorari.

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[1] The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(g)(1).

The second basis raised in the petition also does not justify review by this Court. Petitioner argues that there is a split in the circuits on whether a court's remand to the plan for further consideration is sufficient to permit an award of attorney's fees and costs under ERISA. This issue has indirectly been the subject of a decision by this Court. In *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001), this Court explained that to be eligible for an award of fees, there must be a judgment on the merits or a court-ordered consent decree. A remand to the plan does not satisfy these requirements. For this reason as well, the petition should be denied.

REASONS FOR DENYING THE PETITION

I. No Considerations Warrant this Court's Review of the Fourth Circuit's Decision that a Party Must Prevail to Recover Attorney's Fees under ERISA.

A. The Supreme Court Has Already Decided the Issue Presented for Review by Petitioner.

As noted, Petitioner asks whether the Fourth Circuit erred when it limited an award of attorney's fees under § 502(g) of ERISA to only a prevailing party. Petitioner overlooks the fact that the Supreme Court has already commented on this issue. *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 89 n.14 (1982). In *Kaiser Steel*, the district court entered judgment in favor of the respondent and awarded attorney's fees under § 502(g) of ERISA. That decision was affirmed by the

Court of Appeals. For reasons that are not pertinent to this case, the Supreme Court reversed the judgment in favor of the respondent. Turning next to the district court's award of fees, this Court held that "[b]ecause attorney's fees are normally awarded only to prevailing parties, the award of attorney's fees to respondent is also reversed." *Id.*

In the years since *Kaiser Steel* was decided, the Supreme Court has not identified any circumstances which would allow a court to deviate from the general rule that attorney's fees may only be awarded, if at all, to the prevailing party. This is not surprising since an award of attorney's fees is not the norm and the Supreme Court has expressed "a general practice of not awarding fees" even to a prevailing party "absent explicit statutory authority." *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 262 (1975). Petitioner has not stated any basis which would justify this Court revisiting the issue.

The decision of the Fourth Circuit which Petitioner seeks to have reviewed is consistent with the decision of this Court in *Kaiser Steel*. Even if the Fourth Circuit decision was in conflict, it would still not justify the petition. The decision of the Court of Appeals is unpublished and, therefore, is not binding precedent even in the Fourth Circuit. *Great-West Life & Annuity Ins. Co. v. Information Systems & Network Corp.*, 523 F.3d 266, 272 (4th Cir. 2008). Additionally, pursuant to Supreme Court Rule 10, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of ... misapplication of a properly stated rule of law." To the extent that any Court of Appeals has issued a decision that is inconsistent with *Kaiser Steel*,

it does not justify a grant of certiorari. However, as explained below, the "circuit split" argued by Petitioner does not exist.

B. There Is No Actual Split in the Circuits Regarding the Prevailing Party Requirement For an Award of Attorney's Fees under ERISA.

According to the petition before this Court, the prevailing party requirement imposed by the Fourth Circuit has been rejected by the Second, Fifth and Eleventh Circuits. This statement is incorrect. Looking first to the Second Circuit, in support of this proposition, Petitioner cites to *Miller v. United Welfare Fund*, 72 F.3d 1066 (2d Cir. 1995). Decisions from the Second Circuit and the district courts within it both prior to and after the decision in *Miller* have recognized a prevailing party requirement for an award of fees under ERISA.

One of the earliest decision from the Second Circuit which mentions a prevailing claimant in the context of a motion for attorney's fees is *Birmingham v. SoGen-Swiss Int'l Corp. Ret. Plan*, 718 F.2d 515, 523 (2d Cir. 1983). There, the Second Circuit held that "attorney's fees may be awarded to the prevailing party under ERISA in the absence of some particular justification for not doing so." *Id.* The Second Circuit recognized the prevailing party requirement more recently in *Chapman v. ChoiceCare Long Island Long Term Disability Plan*, No. 07-2518-CV, 2009 U.S. App. LEXIS 233 (2d Cir. 2009). District courts within the Second Circuit have also recognized that a party must prevail in order to recover fees under ERISA. *See e.g.*

Sheehan v. Metropolitan Life Ins. Co., 450 F. Supp. 2d 321, 324 (S.D.N.Y. 2006) ("The law of this Circuit makes it plain that an ERISA plaintiff must prevail in his action in order to recover attorney's fees."); *Cefali v. Buffalo Brass Co., Inc.*, 748 F. Supp. 1011, 1017 (W.D.N.Y. 1990) (same).

Additionally, the Second Circuit's decision in *Miller* is not as definitive as Petitioner suggests. After the language in *Miller* relied on by Petitioner, the Second Circuit stated that "the district court may in fact determine that Miller is the prevailing party ...." *Miller*, 72 F.3d at 1074. There is no dispute in any circuit that it is within the discretion of a court to award fees to a prevailing party under ERISA.

The Fifth Circuit decision relied on by Petitioner also does not support her argument that there is a split in the circuits. Petitioner cites to *Gibbs v. Gibbs*, 210 F.3d 591 (5th Cir. 2000), as "expressly reject[ing]" the prevailing party requirement." Contrary to this statement, and quoting from an earlier Fifth Circuit decision, the court recognized that ERISA "allows the court to award ERISA beneficiaries, participants, and fiduciaries reasonable attorney's fees when they are the prevailing party." *Gibbs*, 210 F.3d at 503 (quoting *Boggs v. Boggs*, 82 F.3d 90, 94 n.1 (5th Cir. 1996), *rev'd on other grounds*, 520 U.S. 833 (1997)). At issue in *Gibbs* was the "propriety of awarding fees to prevailing defendants, or to other third parties who may have been forced to join in an ERISA action." *Gibbs*, 210 F.3d at 503. According to the Fifth Circuit, its earlier decision in *Boggs* "simply does not speak to" this issue. *Id.* However, *Boggs* does speak directly to the issue in

this case and the Fourth Circuit's decision against Petitioner is consistent with *Boggs*.

More recently, the Fifth Circuit reiterated the prevailing party requirement as stated in *Boggs*. *See Wade v. Hewlett-Packard Dev. Co. LP Short Term Disability Plan*, 493 F.3d 533, 543 (5th Cir. 2007). Petitioner attempts to limit the holding in *Wade* to only those cases involving an award of costs. The ERISA statute makes no distinction between a request for fees and one for costs. Section 502(g) of ERISA states that a court "may allow a reasonable attorney's fee and costs of action...." 29 U.S.C. § 1132(g)(1). *Wade* unequivocally imposes a "prevailing party" requirement under "ERISA's fee-shifting provision." *Id*. Accordingly, Fifth Circuit law does not support Petitioner's argument that there is a split in the circuits.[2]

At first glance, Eleventh Circuit law may appear inconsistent with the Fourth Circuit's decision; however, it is not. Petitioner ignores the context in which the Eleventh Circuit stated that the ERISA fee-shifting statute permits an award of fees to either party. The statement relied on by Petitioner appears in decisions in which the Eleventh Circuit has rejected the argument that there should be a presumption in favor of awarding fees to a prevailing claimant. *See Florence Nightingale Nursing Service, Inc. v. Blue*

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[2] The decision of the Fifth Circuit in *Wade* is important for an additional reason. To the extent that *Gibbs* can be interpreted in the manner suggested by Petitioner, it would not be binding precedent in the Fifth Circuit due to a conflict with an earlier panel's decision. The Fifth Circuit recognizes that "[w]hen there are conflicting panel decisions, the earliest panel decision controls." *Wade*, 493 F.3d at 543.

Cross/Blue Shield of Alabama, 41 F.3d 1476, 1485 (1995); *Freeman v. Continental Ins. Co.*, 996 F.2d 1116, 1119 (11th Cir. 1993). *Dixon v. Seafarers' Welfare Plan*, 878 F.2d 1411, 1412 (11th Cir. 1989). The Eleventh Circuit rejected a presumption in favor of awarding fees to a prevailing claimant because the statute "allows a court to award fees to either party." *Freeman*, 996 F.2d at 1119. This is not the issue that Petitioner is asking this Court to review.

Petitioner also cites to the Eleventh Circuit's decision in *Sharron v. Amalgamated Ins. Agency Services, Inc.*, 704 F.2d 562, 569 (11th Cir. 1983). In *Sharron*, the Eleventh Circuit actually reversed the district court's award of attorney's fee in favor of the plaintiff. This decision was based on the court's conclusion that the defendant was entitled to judgment in its favor and because "ERISA does not apply to this Pension Plan." *Sharron*, 704 F.2d at 569. Clearly, the actual decision in *Sharron* does not support Petitioner. Significantly, Petitioner cannot identify a single case in which the Eleventh Circuit permitted an award of attorney's fees to a non-prevailing party in an ERISA case.

Petitioner next argues that other circuits also may not require prevailing party status for an award of attorney's fees. Cases from these other circuits also do not support this contention. One circuit identified by Petitioner is the Sixth Circuit. However, in *Gaeth v. Hartford Life Ins. Co.*, 538 F.3d 524, 534 (6th Cir. 2008), the court suggested that "a district court would always abuse its discretion by awarding attorney fees to a losing party, or to a claimant who has yet to obtain the sought after award of benefits." *Id.* The court did not

need to reach a decision on this issue, however, due to other errors by the district court. In other cases, the Sixth Circuit has recognized that fees may be awarded to the prevailing party under ERISA. *Moore v. Lafayette Life Ins. Co.*, 458 F.3d 416, 444 (6th Cir. 2006); *Fleming v. Ayers & Associates*, 948 F.2d 993, 999 (6th Cir. 1991) (holding that the claimant was entitled to reasonable attorneys fees "[a]s a prevailing party on her ERISA claim.").

Next, Petitioner argues that there is conflicting authority in the First Circuit. To the contrary, that court has consistently stated that attorney's fees are only available to a prevailing party. *Cook v. Liberty Life Assur. Co. of Boston*, 344 F.3d 122, 123 (1st Cir. 2003); *Doe v. Travelers Ins. Co.*, 167 F.3d 53, 61 (1st Cir. 1999). The same is true in the other circuits referenced by Petitioner. *See Laborer's Pension Fund v. Lay-Com*, 58 F.3d 602, 615, 616 (7th Cir. 2009) (concluding that the claimants were still entitled to fees even though the decision of the district court was reversed in part because they were "prevailing parties"); *Tate v. Long Term Disability Program*, 545 F.3d 555, 557 (7th Cir. 2008) (affirming the district court's denial of the motion for attorney's fees because the claimant did not attain "prevailing party status"); *Rittenhouse v. UnitedHealth Group Long Term Disability Insurance Plan*, 476 F.3d 626, 633 (8th Cir. 2007) (reversing the award of attorney's fees because the claimant was no longer a "prevailing party" after the court reversed the judgment of the district court); *Dillards Liberty Life Assur. Co. of Boston*, 456 F.3d 901, 903 (8th Cir. 2006) (vacating the award of attorney's fees because the claimant was no longer the prevailing party); *Jackson v. Metro. Life. Ins. Co.*, 303

F.3d 884, 890 (8th Cir. 2002). Once again, Petitioner has not identified a single case in which a court actually awarded attorney's fees to a non-prevailing party under ERISA.

As further justification for review by this Court, Petitioner argues that the Fourth Circuit's decision conflicts with the reasoning in prior decisions by this Court. There is only one decision in which the Supreme Court discussed an award of fees under ERISA. In *Kaiser Steel*, the Court stated that under ERISA, "attorney's fees are normally awarded only to prevailing parties." *Kaiser Steel*, 455 U.S. at 89 n. 14. The Fourth Circuit's decision against Petitioner is consistent with *Kaiser Steel*. Petitioner fails to even mention the Court's decision in *Kaiser Steel*, let alone distinguish it. Simply stated, there is no split in the circuits. Therefore, certiorari is not justified.

II. The Supreme Court Has Already Addressed in *Buckhannon* the Second Issue Presented by Petitioner.

Relying on this Court's decision in *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001), the Fourth Circuit concluded that a remand to the plan for further review of the claim does not allow for the recovery of attorney's fees under ERISA. As noted by Petitioner, *Buckhannon* involved a request for fees under different federal fee-shifting statutes. However, this distinction is irrelevant. The statutes at issue in *Buckhannon* required a plaintiff seeking fees to prevail just as this Court has required under the ERISA statute. *Kaiser Steel*, 455 U.S. at 89 n. 14. The Supreme Court held in

Buckhannon that a party "prevails" only when there is a (1) a judgment on the merits or (2) a court-ordered consent decree which creates a material alteration of the legal relationship between the parties. *Buckhannon*, 532 U.S. at 604. Neither of these conditions precedent for a motion for fees is present when a court simply remands the claim for further review by the plan and the claim is then settled.

Petitioner cites to a handful of decisions from a few circuits in support of her statement that there is a split in the circuits on whether a remand is sufficient for an award of fees. Nearly all of these decisions pre-date *Buckhannon*. One case decided after *Buckhannon* that is cited by Petitioner is *Peterson v. Continental Casualty Co.*, 282 F.3d 112 (2d Cir. 2002). Petitioner incorrectly states that *Peterson* conflicts with the decision of Fourth Circuit. In *Peterson*, the court entered judgment in favor of the claimant on the claim for benefits after the court-ordered remand. Thus, he was clearly a prevailing party. Those facts are not present in this case. No court entered judgment in favor of Petitioner awarding her benefits. Unlike *Peterson*, it was Respondent who concluded that Petitioner was eligible for benefits during the remand. Even if a court has issued a decision contrary to *Buckhannon*, it would not justify granting the petition. When a court misapplies "a properly stated rule of law" it will "rarely" justify certiorari. Supreme Court Rule 10. The issues raised in the unpublished Fourth Circuit decision in this case do not warrant further review by this Court.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

(3)

No. 09-448

Supreme Court, U.S.
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DEC 29 2009
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In The
Supreme Court of the United States

BRIDGET HARDT,

Petitioner,

v.

RELIANCE STANDARD
LIFE INSURANCE COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF FOR PETITIONER

This petition presents pure questions of law that significantly impact enforcement of ERISA rights. The issues are direct, straightforward and presented in a compelling case vehicle, as they exclusively determined the outcome below. This Court should grant certiorari on both questions presented.

First, the lower courts are deeply divided regarding whether ERISA Section 502(g)(1), which expressly allows an award of fees "to either party," nonetheless contains an implied prevailing party requirement. Respondent's brief in opposition (BIO) truncates a footnote from *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), to assert the Court has previously decided the issue. Yet, the issue presented here was not raised, briefed or decided in *Mullins*. Respondent's boilerplate "no circuit split" assertion also is misplaced, as courts and commentators have acknowledged the split.

In regard to the second question, Respondent urges this Court to deny review based on this Court's decision in *Buckhannon Bd. & Care Home, Inc. v. W. VA. Dep't of Health & Human Res.*, 532 U.S. 598 (2001), which addressed certain prevailing party fee statutes. Yet, Respondent's argument (and the Fourth Circuit decision under review) relies on the faulty premise that *Buckhannon* controls because Section 502(g)(1) is a prevailing party statute. It is not. It allows a court to award fees "to either party." It does not even require a judgment, as other fee shifting statutes do. Courts outside the Fourth

Circuit have ruled that *Buckhannon* does not apply to ERISA.

Moreover, even if some type of prevailing party standard exists within Section 502(g)(1), courts outside the Fourth Circuit would have deemed Petitioner a prevailing party based on the district court's finding of an ERISA violation and remand for a redetermination of benefits. *See, e.g., Colby v. Assurant Employee Benefits, et al.*, 635 F. Supp. 2d 88, 96 (D. Mass. 2009) (recognizing courts "have split almost evenly on the issue" and holding that a court-ordered remand satisfies a prevailing party standard, and cases cited therein); *see also* Pet. 29-33. Respondent does not address these cases.

The Court should grant certiorari to decide these important issues and provide needed clarity to the divided lower courts.

I. This Court Should Grant Certiorari To Confirm That Section 502(g)(1) Does Not Contain An Implied Prevailing Party Requirement.

Section 502(g)(1) is clear: "the court in its discretion may allow a reasonable attorney's fee and costs of action *to either party*." 29 U.S.C. § 1132(g)(1) (emphasis added). The petition explained why the Fourth Circuit decision under review was wrong on the merits, Pet. at 23-28, and why the other circuits are correct to conclude that Section 502(g)(1) does not contain a prevailing party requirement. *See id.* at 18-20.

Respondent does not address the merits, but instead urges this Court to deny certiorari on the grounds that the issue has been decided and that no actual circuit split exists. Both contentions lack merit.

A. Whether Section 502(g)(1) Requires Prevailing Party Status Is An Open Issue.

This Court has not held that Section 502(g)(1) requires prevailing party status for fees. Arguing otherwise, Respondent misreads and mischaracterizes *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982).

In *Mullins*, the plaintiffs sought to recover unpaid contributions to a multiemployer benefits plan, and Kaiser sought to raise the defense that the promised contributions were illegal. *See Mullins*, 455 U.S. at 76. The courts below determined that Kaiser could not interpose the illegality defense, thereby requiring the contributions. *See id.* 76, 78-9. The district court awarded fees, and the court of appeals affirmed, noting fees were available under either of the statutes at issue, Section 301 of the LMRA or Section 502 of ERISA, and holding the district court did not abuse its discretion in awarding fees under ERISA. *Mullins v. Kaiser Steel Corp.*, 642 F.2d 1302, 1320 (D.C. Cir. 1980).

Kaiser sought review in this Court regarding its illegality defense and the basis for the fee award. The fee analysis concerned whether ERISA applied to the suit at all, not whether Section 502(g)(1) mandates prevailing party status. *See* Petition for Writ of Certiorari (Corrected Copy) at (i), *Mullins*, 455 U.S. 72 (1982) (No. 80-1345). Kaiser contended that only

Section 301 of the LMRA applied without fee-shifting and that ERISA did not apply because the case was an action to enforce a collective bargaining agreement. *Id.* at 25-28; Brief for Petitioner Kaiser Steel Corporation at 47-49. The parties also disputed whether the new cause of action and fee provision in Section 306 of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96-364, 94 Stat. 1208, affected the case.

The issue the Court ultimately decided in *Mullins* was "whether a coal producer, when it is sued on its promise to contribute to union welfare funds based on its purchases of coal from producers not under contract with the union, is entitled to plead and have adjudicated a defense that the promise is illegal under the antitrust and labor laws." *Mullins*, 455 U.S. at 74. In so ruling, the Court assumed that the 1980 ERISA Amendments applied and held that Kaiser was entitled to raise its illegality defense even under those amendments. 455 U.S. at 87.

The Court therefore reversed and remanded, adding this footnote:

> Because attorney's fees are normally awarded only to prevailing parties, the award of attorney's fees to respondents is also reversed. The Court of Appeals held that the District Court had jurisdiction over this action pursuant to § 502 of ERISA and did not abuse its discretion in awarding attorney's fees under § 502(g). That section permits a court to "allow a reasonable attorney's fee and

> costs of action to either party" in an action brought under § 502. Petitioners contend that this is not a suit to enforce ERISA, it cannot be brought under § 502, and therefore there is no authority for an award of attorney's fees. It is unnecessary to reach this issue.

Id., at 89, n.14.

A full reading of *Mullins* shows that the Court did not decide the issue here--whether Section 502(g)(1) *requires* prevailing party status for a fee award. The Court assumed a separate, distinct statutory provision applied. The *Mullins* footnote simply acknowledged the interlocutory nature of the suit given the remand. Indeed, the Court declined to address whether ERISA applied to the suit. Thus, the language Respondent relies on, even assuming it relates to Section 502(g)(1) despite the earlier assumption in the same section of the opinion that the 1980 ERISA Amendments applied instead, is *obiter dictum*.

B. The Lower Courts Have Split On This Important, Frequently Recurring Issue.

In the absence of clear authority from this Court, including in the 27 years since *Mullins*, the lower courts remain deeply divided on whether a prevailing party requirement exists within Section 502(g)(1). Pet. at 16-23 (describing the split between those circuits that do not impose a prevailing party requirement (Second, Fifth, Eleventh, and Sixth and

likely Eighth as well) with those that do impose such a requirement (First, Fourth, Seventh and Tenth). *See also* Eric C. Surette, Annotation, *Requirement that Party Prevail to Obtain Attorney's Fees under § 502 (g) of ERISA*, 172 A.L.R. Fed. 571 (2001) (reviewing split of authority within and among the circuits). Respondent's boilerplate assertion that the circuits are not split is incorrect.

Respondent contends the Second Circuit has imposed a "prevailing party requirement for an award of fees under ERISA," BIO at 4, but misreads the cases in attempting to downplay the split. For example, Respondent cites *Birmingham v. SoGen Swiss Int'l Corp. Ret. Plan*, 718 F.2d 515, 523 (2d Cir. 1983), but the Second Circuit stated that "attorney's fees may be awarded to the prevailing party under ERISA in the absence of some particular justification for not doing so." *Id.* (citing *Central States Southeast v. Hitchings Trucking, Inc.*, 492 F. Supp. 906 (E.D. Mich. 1980)).[1] That is an entirely different proposition than *only* prevailing parties may be awarded fees.[2]

The Second Circuit in *Miller v. United Welfare Fund*, held that "Section 501(g)(1) contains no

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[1] In *Hitchings Truck*, the court noted that Section 502(g)(1) "is unlike the attorney's fee provision of federal civil rights laws in that there is no requirement that the award go only to a 'prevailing party.'" *Ibid.*, 492 F. Supp. at 909.

[2] Respondent also misplaces reliance on *Chapman v. Choicecare Long Island Long Term Disability Plan*, No. 07-2518-CV, 2009 U.S. App. LEXIS 233 (2d Cir. 2009). *Chapman* quoted the above language from *Birmingham*. It did not hold that *only* prevailing parties are entitled to fees.

requirement that the party awarded attorney's fees be the prevailing party" and remanded for a determination of fees even though the court vacated the judgment in favor of plaintiffs. 72 F.3d 1066, 1074 (2d Cir. 1995). *See also, Salovaara v. Eckert*, 222 F.3d 19, 27-28 (2d Cir. 2000) (holding that pursuant to Section 502(g)(1) "a court has discretion to award attorney's fees 'to either party'" and that the test for awarding fees is "applicable regardless of which party seeks attorney's fees") (quoting Section 502(g)(1)); *Tourangeau v. Uniroyal, Inc.*, 101 F.3d 300, 308, n.6 (2d Cir. 1996) ("A party need not succeed on the merits in order for its counsel to receive fees under [Section 502(g)(1)].") (citing *Miller*).

Respondent likewise misinterprets Fifth Circuit cases in arguing there is no circuit split. BIO at 5-6. Recognizing that the question here has "created a split of authority among a number of our sister circuit courts of appeal," the Fifth Circuit held that "a party need not prevail in order to be eligible for an award of attorneys' fees under [Section 502(g)(1)] of ERISA." *Gibbs v. Gibbs*, 210 F.3d 491, 501, 503 (5th Cir. 2000). The Fifth Circuit's language was clear: "We decline to join the Fourth Circuit . . . imposing a prevailing party limitation on the availability of attorneys' fees under ERISA." *Id.* at 503.[3]

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[3] The Fifth Circuit does require prevailing party status for an award of costs under ERISA. Pet. at 19 and n.2, citing *Wade v. Hewlett-Packard Dev. Co. LP Short Term Disability Plan*, 493 F.3d 533, 543 (5th Cir. 2007). Respondent contends *Wade* imposes a prevailing party requirement, but *Wade* specifically noted that no such requirement exists for fees: "Absent is any requirement that the party under consideration for fee-shifting . . . be the prevailing one. *See Gibbs v. Gibbs*, 210 F.3d 491, 501 (5th Cir. 2000)." *Wade*, 493 F.3d at 542, n.6.

Respondent also misreads *Gaeth v. Hartford Life Ins. Co.*, 538 F.3d 524, 534 (6th Cir. 2008), in asserting that the Sixth Circuit may require prevailing party status. BIO at 7. In fact, the Sixth Circuit in *Gaeth* expressly contemplated that fees could be awarded to a losing party under Section 502(g)(1). The case involved an appeal of an interim award of fees after the district court remanded to the plan administrator for a redetermination of benefits. *Id.* at 528. The Sixth Circuit found that "the express language of 29 U.S.C. § 1132 does not limit an award of attorney fees to the prevailing party," but remanded for a more careful analysis given the "possibility that Gaeth could receive attorney fees . . . even if he ultimately loses." *Id.* at 534.

Though cited in the petition, Respondent also fails to address that the Sixth Circuit in *First Trust Corp. v. Bryant*, 410 F.3d 842, 849, 851-55 (6th Cir. 2005), held that a party–one who had "taken the losing position in virtually every significant issue involved in th[e] case"–was nonetheless entitled to fees.

Furthermore, even in the limited time since the filing of the petition, several circuits have reinforced their position within the split, though none of the decisions as cleanly and squarely presents the issues as this case.

For example, the Fifth Circuit recently reinforced that fees may be awarded to either party and examined whether an appellant was entitled to attorneys fees, even though she lost on summary judgment. *See Graham v. Metro. Life Ins. Co.*, 2009

U.S. App. LEXIS 23337, at *12-13 (5th Cir. Oct. 22, 2009).

In contrast, the Seventh Circuit reaffirmed that attorneys' fees should issue only to a prevailing party and against a "losing party." *See Bandak v. Eli Lilly & Co. Ret. Plan*, --- F.3d ---, 48 Employee Benefits Cas. (BNA) 1001, 2009 U.S. App. LEXIS 25369, at *11-12 (7th Cir. 2009).

The First Circuit recently declined to award fees to a non-prevailing party. *Medina v. Metro. Life Ins. Co.*, --- F.3d ---, 2009 U.S. App. LEXIS 25879, *16 (1st Cir. 2009) ("Because we conclude that Medina does not prevail on any of his substantive claims, we affirm the district court's denial of Medina's request for fee-shifting.").

The First Circuit thus stands in line with the Fourth, Tenth and Seventh Circuits requiring prevailing party status before fees may be awarded, in direct conflict with the Second, Fifth, Sixth and Eleventh Circuits,[4] as well as the Eighth Circuit's decision remanding for a determination of whether

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[4] Respondent argues that the Eleventh Circuit in *Freeman v. Continental Ins. Co.*, 996 F.2d 1116, 1119 (11th Cir. 1989), held not that fees may be awarded to either party under Section 501(g)(1), but that there should be no presumption for awarding fees to a prevailing claimant, an issue Respondent contends is not under review here. *See* BIO at 6-7. Yet, *Freeman* decided both issues independently. *Ibid.*, 996 F.2d at 1119. And, Respondent myopically construes the scope of the second question, though this Court likely will not need to reach the issue of whether a prevailing party presumption applies given the limited scope of the appeal by Respondent below. *See* Pet. at 11.

claimants, who were no longer prevailing parties, nonetheless were entitled to fees. *Antolik v. Saks, Inc.*, 463 F.3d 796, 803 (8th Cir. 2006).

This widely-acknowledged split has festered long enough. The lower courts have solidified in their divergent positions. This Court should grant certiorari.

II. This Court Should Review the Circumstances Under Which Attorney's Fees May Be Awarded To ERISA Participants or Beneficiaries.

There is also significant inconsistency and conflict in the lower courts regarding whether *Buckhannon* applies to ERISA and under what circumstances a participant or beneficiary qualifies as a prevailing party for an award of fees.

Respondent errs in arguing that the second question presented was resolved in *Buckhannon*. BIO at 9-10. *Buckhannon* involved prevailing party fee-shifting statutes. Respondent contends, relying on *Mullins*, that Section 502(g)(1) is a prevailing party statute, too. BIO at 9. It is not. The clear language allowing fees "to either party" differentiates ERISA's fee-shifting provision, and as shown above, *Mullins* did not hold that Section 502(g)(1) requires prevailing party status.

Respondent also overlooks that other courts have declined to apply *Buckhannon*'s prevailing party test to ERISA. For example, in *Adams v. Bowater Inc.*, 313 F.3d 611, 615 (1st Cir. 2002), the First

Circuit noted in an ERISA case raising tactical mooting issues that "[w]hether the plaintiffs can recover attorney's fees does not necessarily depend on whether a formal judgment has been entered." The First Circuit distinguished *Buckhannon* because "the ERISA statute is differently phrased and conceivably the result could be different." *Id.* *See also, Becker v. Weinberg Group, Inc.*, 554 F. Supp. 2d 9, 16, n.6 (D.D.C. 2008) (declining to apply *Buckhannon* to Section 502(g)(1)).

Moreover, while the Fourth Circuit considers "only" enforceable judgments on the merits or court-ordered consent decrees as satisfying *Buckhannon*, Pet. at 8a, other courts disagree. *See, e.g., Carbonell v. INS*, 429 F.3d 894, 898 (9th Cir. 2005) (quoting *Buckhannon* to hold that enforceable judgments on the merits and court-ordered consent decrees are "examples" but not the only "examples" of judicial action sufficient to convey prevailing party status); *see also, Flom v. Holly Corp.*, 276 Fed. Appx. 615, 616 (9th Cir. 2008) (applying *Carbonell* to ERISA and holding that the "judicially-sanctioned change in the parties' relationship need not be a judgment on the merits, and a prevailing plaintiff need not achieve directly through the judicial order itself the ultimate benefit sought.").

Even where a prevailing party requirement is read into Section 502(g)(1), courts have diverged regarding whether, as here, a judicial finding of an ERISA violation, coupled with a remand for a redetermination of benefits, suffices to confer prevailing party status. The Fourth Circuit held below, in line with the Seventh Circuit, that this does

not confer prevailing party status, but other courts have reached the opposite conclusion. *See, e.g., Flom*, 276 Fed. Appx. at 616 ("The district court's remand provided the judicial imprimatur required by *Buckhannon* – it changed [the] legal relationship [] and ultimately led to [claimant's] success in securing a reinstatement of benefits."); *Mizzell v. Provident Life & Accident Ins. Co.*, 32 Fed. Appx. 352, 354 (9th Cir. 2002) (holding remand alone conferred prevailing party status); *Colby*, 635 F. Supp. 2d at 96 (same and citing additional cases); Pet. at 29-32.

This ongoing split is undermining legitimate enforcement of ERISA. This Court recognizes Congress sought to prevent underenforcement of ERISA rights via Section 502(g)(1). *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985). Yet, plan administrators in the Fourth Circuit are now incented to vigorously oppose claims in violation of ERISA, for if the claimant elects to pursue the matter in court and is able to secure a remand, the plan can simply pay the claim and tactically moot the case at that later point, thereby avoiding liability for attorney's fees. If this result is allowed to stand, most claimants, especially those with small claims or limited means, effectively will have been denied their rights in contravention of the clear purpose of ERISA.

CONCLUSION

This case presents a unique opportunity—perhaps not recurring in such a clean, straightforward manner for many years—for this Court to provide needed uniformity with respect to the standards for attorneys' fees in ERISA enforcement actions that

arise each year in thousands of federal district court cases. Petitioner urges the Court to grant a writ of certiorari to review the Fourth Circuit's misguided attorneys' fees standards in ERISA cases.

Respectfully Submitted,

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December 29, 2009

JOINT APPENDIX

(5)

No. 09-448

Supreme Court, U.S.
FILED
FEB 25 2010
OFFICE OF THE CLERK

In The Supreme Court of the United States

BRIDGET HARDT,

Petitioner,

v.

RELIANCE STANDARD LIFE INSURANCE COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED: OCTOBER 14, 2009
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The following opinions and orders have been omitted in printing this Joint Appendix because they appear in the appendix of the Petition for a Writ of Certiorari filed by the Petitioner on the following pages:

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General Docket
Fourth Circuit Court of Appeals
Court of Appeals Docket #: 08-1896

Date Filed	#	Docket Text
08/26/2008	1	Case docketed.
08/26/2008	2	DOCKETING NOTICE issued.
08/27/2008	3	APPEARANCE OF COUNSEL filed (Local Rule 46(c)) for Reliance Standard Life Insurance Company.
08/27/2008	4	DOCKETING STATEMENT filed by Appellant Reliance Standard Life Insurance Company.
08/27/2008	5	DISCLOSURE OF CORPORATE AFFILIATIONS (Local Rule 26.1) filed by Appellant Reliance Standard Life Insurance Company.
08/27/2008	6	BRIEFING ORDER filed. Opening Brief and Appendix due 10/06/2008. Response Brief due 11/10/2008.
08/27/2008	7	APPEARANCE OF COUNSEL filed (Local Rule 46(c)) by Joshua F. P. Long for Reliance Standard Life Insurance Company.

09/03/2008	8	APPEARANCE OF COUNSEL filed (Local Rule 46(c)) by Elaine K. Inman for Bridget Hardt.
09/03/2008	9	DISCLOSURE OF CORPORATE AFFILIATIONS (Local Rule 26.1) filed by Appellee Bridget Hardt.
09/03/2008	10	OBJECTION to DOCKETING STATEMENT filed by Appellee Bridget Hardt.
09/11/2008	11	ORDER filed extending filing time for opening brief and appendix until 10/20/08; updating/ resuming briefing order deadlines. Opening brief and appendix due 10/20/2008. Response brief due 11/24/2008 Copies to all parties.
10/08/2008	12	MOTION filed by Appellant Reliance Standard Life Insurance Company to extend filing time for opening brief and appendix until 11/3/2008.
10/09/2008	13	RESPONSE/ANSWER filed by Bridget Hardt to Motion to extend filing time.

10/09/2008	14	ORDER filed granting Motion to extend filing time; updating/ resuming briefing order deadlines. Opening brief and appendix due 11/03/2008. Response brief due 12/08/2008 Copies to all parties.
11/03/2008	15	BRIEF filed by Appellant Reliance Standard Life Insurance Company in electronic and paper format. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 11/03/2008.
11/03/2008	16	Notice of paper filing of appendix. Date paper copies mailed, dispatched or delivered to court: 11/03/2008.
11/03/2008	17	OPENING BRIEF (PAPER) file-stamped, on behalf of Reliance Standard Life Insurance Company.
11/03/2008	18	APPENDIX (PAPER) file-stamped, on behalf of Reliance Standard Life Insurance Company. Total number of volumes (including any sealed): 2. Total number of pages in all volumes: 728.

12/08/2008	19	BRIEF filed by Appellee Bridget Hardt in electronic and paper format. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 12/08/2008.
12/08/2008	20	RESPONSE BRIEF (PAPER) file-stamped, on behalf of Bridget Hardt.
12/16/2008	21	BRIEF filed by Appellant Reliance Standard Life Insurance Company in electronic and paper format. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 12/16/2008.
12/16/2008	22	REPLY BRIEF (PAPER) file-stamped, on behalf of Reliance Standard Life Insurance Company.
01/09/2009	23	CASE TENTATIVELY CALENDARED for oral argument during the 3/24/09 - 3/27/09 argument session. Notify Clerk's Office of any scheduling conflict by: 01/19/2009.
02/04/2009	24	CASE CALENDARED for oral argument. Date: 03/25/2009. Time: 8:45 - 9:00.

02/05/2009	25	ORAL ARGUMENT ACKNOWLEDGMENT filed by Appellant Reliance Standard Life Insurance Company.
02/11/2009	26	APPEARANCE OF COUNSEL filed (Local Rule 46(c)) by Ann K. Sullivan for Bridget Hardt.
02/11/2009	27	ORAL ARGUMENT ACKNOWLEDGMENT filed by Appellee Bridget Hardt. Counsel arguing: Ann K. Sullivan.
03/17/2009	28	SUPPLEMENTAL AUTHORITIES (FRAP 28(j)) filed by Appellant Reliance Standard Life Ins. Co.
03/25/2009	29	ORAL ARGUMENT heard before the Honorable KAREN J. WILLIAMS, J. HARVIE WILKINSON, III and DAVID A. FABER. Attorneys arguing case: Mr. Joshua Bachrach, Esq. for Appellant Reliance Standard Life Insurance Company and Ann Sullivan for Appellee Bridget Hardt.
07/14/2009	30	UNPUBLISHED PER CURIAM OPINION filed.
07/14/2009	31	JUDGMENT ORDER filed. Decision: vacated.

07/28/2009	32	PETITION for rehearing and rehearing en banc filed by Bridget Hardt.
07/28/2009	33	Mandate stayed by FRAP 41(d)(1).
07/31/2009	34	REQUEST for oral argument tape/CD filed by Bridget Hardt.
08/05/2009	35	Oral argument cd sent to Ann K. Sullivan (Crenshaw, Ware & Martin).
08/10/2009	36	COURT ORDER filed denying Motion for rehearing and rehearing en banc.
08/18/2009	37	Mandate issued.
10/20/2009	38	SUPREME COURT REMARK – petition for writ of certiorari filed. 10/14/2009. 09-448.
01/25/2010	39	SUPREME COURT REMARK – petition for writ of certiorari granted. 01/15/2010.

United States District Court
Eastern District of Virginia
CIVIL DOCKET FOR CASE
#: 2:07-CV-00105-JBF-JEB

Date Filed	#	Docket Text
03/05/2007	1	COMPLAINT against Reliance Standard Life Insurance Company, Dan River Group Long-Term Disability Plan (Filing fee $ 350, receipt number 200 55115), filed by Bridget Hardt.(jcow,) (Entered: 03/06/2007)
03/05/2007	2	NOTICE of Appearance by Ann Katherine Sullivan on behalf of Bridget Hardt (jcow,) (Entered: 03/06/2007)
03/06/2007		Summonses with one copy issued as to Reliance Standard Life Insurance Company, Dan River Group Long-Term Disability Plan, mag notice and provided to counsel for service. (jcow,) (Entered: 03/06/2007)
03/08/2007	3	Financial Interest Disclosure Statement (Local Rule 7.1) by Bridget Hardt. (jcow,) (Entered: 03/08/2007)

03/21/2007	4	SUMMONSES Returned Executed by Bridget Hardt; Reliance Standard Life Insurance Company served on 3/13/2007; Dan River Group Long-Term Disability Plan served on 3/13/2007 (jcow,) (Entered: 03/21/2007)
03/30/2007	5	ANSWER to Complaint by Reliance Standard Life Insurance Company, Dan River Group Long-Term Disability Plan.(jcow,) (Entered: 04/03/2007)
03/30/2007	6	Financial Interest Disclosure Statement (Local Rule 7.1) by Reliance Standard Life Insurance Company, Dan River Group Long-Term Disability Plan. (jcow,) (Entered: 04/03/2007)
04/03/2007		Refer for 16(b) (jcow,) (Entered: 04/03/2007)

04/09/2007	7	SCHEDULING ORDER: Initial Pretrial Conference set for 4/26/2007 11:00 AM before District Judge Walter D. Kelley Jr... Signed by Judge James E. Bradberry and filed on 4/9/07. Copies mailed: 4/9/07(jcow,) (Entered: 04/09/2007)
04/30/2007	8	RULE 16(b) SCHEDULING ORDER: Final Conference set for 7/6/2007 at 02:30 PM before Magistrate Judge James E. Bradberry. Bench Trial set for 7/17/2007 at 10:00 AM before District Judge Walter D. Kelley Jr.. Trial by jury has not been demanded, proposed findings of facts and conclusions of law shall be delivered to the clerk by 7/10/07. Signed by Judge Walter D. Kelley Jr. and filed on 4/30/07. Copies mailed: 4/30/07(jcow,) Modified on 7/2/2007 to correct initial pretrial conference to final pretrial conference(mwin,). (Entered: 04/30/2007)
05/11/2007	9	Letter from Bridget Hardt filed at the direction of the court. (jcow,) (Entered: 05/11/2007)

05/11/2007	10	Letter from Reliance Standard Life Insurance Company filed at the direction of the court. (jcow,) (Entered: 05/11/2007)
05/11/2007	11	ORDER denying plaintiff Hardt's request for discovery, all outstanding requests for discovery are stricken, except where necessary to comply with this order; directing plaintiff to brief the issue of whether a delay past the prescribed time frame precludes Reliance from availing itself of the modified abuse of discretion standard, that brief is due within 20 days of the date of this order, Reliance may oppose and Hardt may reply according to the normal briefing schedule of this court. Signed by Judge Walter D. Kelley Jr. and filed on 5/11/07. Copies mailed: 5/11/07(jcow,) (Entered: 05/11/2007)
05/31/2007	12	MOTION to Apply De Novo Standard of Review by Bridget Hardt. (rlam) (Entered: 06/01/2007)

05/31/2007	13	Memorandum in Support re 12 MOTION to Apply De Novo Standard of Review by Bridget Hardt, received. (rlam) (Entered: 06/01/2007)
06/08/2007	14	RESPONSE in Opposition re 12 MOTION to Apply De Novo Standard of Review filed by Reliance Standard Life Insurance Company, Dan River Group Long-Term Disability Plan. (jcow,) (Entered: 06/11/2007)
06/08/2007	15	Memorandum in Opposition re 12 MOTION to Apply De Novo Standard of Review filed by Reliance Standard Life Insurance Company, Dan River Group Long-Term Disability Plan, received. (jcow,) (Entered: 06/11/2007)
06/15/2007	16	REPLY to Response to Motion re 12 MOTION to Apply De Novo Standard of Review filed by Bridget Hardt, received. (jcow,) (Entered: 06/18/2007)
06/18/2007		MOTION REFERRED: 12 MOTION to Apply De Novo Standard of Review REFERRED to Judge Walter D. Kelley, Jr.. (jcow,) (Entered: 06/18/2007)

06/29/2007	17	MOTION to Compel discovery and brief in support by Bridget Hardt. (mwin,) (Entered: 07/02/2007)
07/03/2007	18	Memorandum in Opposition re 17 MOTION to Compel filed by Reliance Standard Life Insurance Company, Dan River Group Long-Term Disability Plan, received. (jcow,) (Entered: 07/05/2007)
07/05/2007		Set/Reset Scheduling Order Deadlines: Final Pretrial Conference set for 7/13/2007 at 02:30 PM before Magistrate Judge James E. Bradberry. (jcow,) (Entered: 07/05/2007)
07/06/2007	19	MOTION for Summary Judgment by Reliance Standard Life Insurance Company, Dan River Group Long-Term Disability Plan. (jcow,) (Entered: 07/06/2007)

07/06/2007	20	Memorandum in Support re 19 MOTION for Summary Judgment filed by Reliance Standard Life Insurance Company, Dan River Group Long-Term Disability Plan, received. (jcow,) (Entered: 07/06/2007)
07/06/2007	21	NOTICE of Hearing on Motion 19 MOTION for Summary Judgment set for 7/17/07 at 10:00 before District Judge Walter D. Kelley, Jr., filed by defendants. (jcow,) (Entered: 07/06/2007)
07/06/2007	22	NOTICE of filing administrative record (with administrative record) by Reliance Standard Life Insurance Company, Dan River Group Long-Term Disability Plan (jcow,) (Entered: 07/06/2007)
07/12/2007	23	ORDER denying 17 Motion to Compel Discovery; the court finds that the proper standard of review in this case is the modified abuse of discretion standard; the parties are directed to file cross motions for summary judgment based on the administrative record; all other dates, including the final pretrial conference and the trial are

		vacated. Signed by Judge Walter D. Kelley Jr. and filed on 7/12/07. Copies mailed: 7/13/07 (jcow,) (Entered: 07/13/2007)
07/17/2007	24	Objection to defendants' 22 NOTICE of filing of administrative record and brief in support, filed by Bridget Hardt. (mwin,) (Entered: 07/18/2007)
07/17/2007	25	MOTION to Strike 19 MOTION for Summary Judgment and brief in support, by Bridget Hardt. (mwin,) (Entered: 07/18/2007)
07/19/2007	26	Response to 24 plaintiffs Objection to defendants' notice of filing of administrative record filed by Reliance Standard Life Insurance Company, Dan River Group Long-Term Disability Plan. (jcow,) (Entered: 07/20/2007)
07/19/2007	27	Memorandum in Opposition re 25 MOTION to Strike 19 MOTION for Summary Judgment filed by Reliance Standard Life Insurance Company, Dan River Group Long-Term Disability Plan, received. (jcow,) (Entered: 07/20/2007)

07/23/2007	28	REPLY to Response to Motion; re 25 MOTION to Strike 19 MOTION for Summary Judgment filed by Bridget Hardt, received. (jcow,) (Entered: 07/24/2007)
07/23/2007	29	Reply to response to 22 NOTICE of filing of administrative record filed by Bridget Hardt, received. (jcow,) (Entered: 07/24/2007)
07/24/2007		MOTION REFERRED: 25 MOTION to Strike 19 MOTION for Summary Judgment REFERRED to Judge Walter D. Kelley, Jr.. (jcow,) (Entered: 07/24/2007)
07/25/2007	30	Memorandum in Opposition re 19 MOTION for Summary Judgment filed by Bridget Hardt, received. (jcow,) (Entered: 07/26/2007)
07/26/2007	31	MOTION for Summary Judgment by Bridget Hardt. (jcow,) (Entered: 07/26/2007)
07/26/2007	32	Memorandum in Support re 31 MOTION for Summary Judgment filed by Bridget Hardt, received. (jcow,) (Entered: 07/26/2007)

08/06/2007	33	REPLY to Response to Motion re 19 MOTION for Summary Judgment filed by Reliance Standard Life Insurance Company, Dan River Group Long-Term Disability Plan, received. (jcow,) (Entered: 08/06/2007)
08/06/2007	34	Memorandum in Opposition re plaintiff's 31 MOTION for Summary Judgment filed by Reliance Standard Life Insurance Company, Dan River Group Long-Term Disability Plan, received. (jcow,) (Entered: 08/06/2007).
08/06/2007		MOTION REFERRED: 19 MOTION for Summary Judgment REFERRED to Judge Walter D. Kelley, Jr.. (jcow,) (Entered: 08/06/2007)
08/09/2007	35	REPLY to Response to Motion re 31 MOTION for Summary Judgment filed by Bridget Hardt, received. (jcow,) (Entered: 08/10/2007)

08/10/2007		MOTION REFERRED: 31 MOTION for Summary Judgment REFERRED to Judge Walter D. Kelley, Jr.. (jcow,) (Entered: 08/10/2007)
08/23/2007		Set Hearing as to 31 MOTION for Summary Judgment, 25 MOTION to Strike 19 MOTION for Summary Judgment, 19 MOTION for Summary Judgment. Motion Hearing set for 9/19/2007 09:00 AM in N Courtroom 3 before District Judge Walter D. Kelley Jr. (mmci) (Entered: 08/23/2007)
09/19/2007	36	HEARING on Cross Motions for Summary Judgment (Docket Nos. 19 and 31). Appearances: Ann Sullivan on behalf of plaintiff and Joshua Long on behalf of defendants. Court takes under advisement.(Court Reporter Penny C. Wile, OCR) (ceic) (Entered: 09/19/2007)
12/18/2007	37	Letter *to Court re: plaintiffs supplemental authority* by Reliance Standard Life Insurance Company. (Long, Joshua) (Entered: 12/18/2007)
12/18/2007		Notice of Correction re 37 Letter; The document was electronically

		filed in a paper case. The filing user was notified to file an original paper document with the clerks office, and the document has been removed from the docket sheet. (jcow,) (Entered: 12/18/2007)
03/31/2008	38	OPINION AND ORDER denying 31 Motion for Summary Judgment; denying 19 Motion for Summary Judgment; and remanding this matter to Reliance and instructs Reliance to act on Ms. Hardt's application by adequately considering all the evidence discussed within this opinion within thirty days of issuance, otherwise, judgment will be issued in favor of Ms. hardt. Signed by Judge District Judge Walter D. Kelley, Jr. on 3/27/08 and filed 3/31/08. Copies mailed: 3/31/08 (jcow,) (Entered: 03/31/2008)
04/07/2008	39	BILL OF COSTS by Bridget Hardt (mwin,) (Entered: 04/08/2008)
04/07/2008	40	AFFIDAVIT of Ann K. Sullivan in support of 39 Bill of Costs, filed by Bridget Hardt. (mwin,) (Entered: 04/08/2008)

04/11/2008	41	Objection to 39 Bill of Costs filed by Reliance Standard Life Insurance Company, Dan River Group Long-Term Disability Plan. (jcow,) (Entered: 04/14/2008)
04/17/2008	42	MOTION for Reconsideration of deadline in opinion and order, by Reliance Standard Life Insurance Company. (jcow,) (Entered: 04/17/2008)
04/17/2008		Set Telephonic Hearing as to 42 MOTION for Reconsideration. Motion Hearing set for 4/18/2008 11:00 AM in N Courtroom 3 before District Judge Walter D. Kelley Jr. (mmci) (Entered: 04/17/2008)
04/17/2008	43	Memorandum in Opposition re 42 MOTION for Reconsideration filed by Bridget Hardt, received. (jcow,) (Entered: 04/17/2008)
04/18/2008	44	REPLY to Response to Motion re 42 MOTION for Reconsideration filed by Reliance Standard Life Insurance Company, Dan River Group Long-Term Disability Plan, received. (jcow,) (Entered: 04/18/2008)

04/18/2008		MOTION REFERRED to Judge Walter D. Kelley, Jr.. 42 MOTION for Reconsideration (jcow,) (Entered: 04/18/2008)
04/18/2008	45	Minute Entry for proceedings held before District Judge Walter D. Kelley, Jr: Motion Hearing held via telephone conference on 4/18/2008 re 42 MOTION for Reconsideration filed by Reliance Standard Life Insurance Company. Arguments of counsel heard and comments of court heard. Court takes matter under advisement and will issue an order. (Court Reporter Penny Wile, OCR; Present via telephone: Ann Sullivan and Elaine Inman for plaintiff; Joshua Long for defendants.) (kgri) (Entered: 04/21/2008)
04/24/2008	46	ORDER re 39 Bill of Costs filed by Bridget Hardt, the document is premature because the judgment has not been entered pursuant to Local Rule 54 and the instrument is stricken from the record. Signed by District Judge Walter D. Kelley, Jr. on 4/23/08 and filed on 4/24/08. Copies mailed: 4/24/08 (jcow,) (Entered: 04/24/2008)

04/24/2008	47	ORDER granting in part 42 Motion for Reconsideration, the court will extend the time to act on Ms. Hardt's application until May 31, 2008. Signed by District Judge Walter D. Kelley, Jr. on 4/23/08 and filed 4/24/08. Copies mailed: 4/24/08 (jcow,) (Entered: 04/24/2008)
05/20/2008		Case reassigned to District Judge Jerome B. Friedman. District Judge Walter D. Kelley, Jr. no longer assigned to the case. (jcow,) (Entered: 05/21/2008)
06/10/2008	48	ORDER that the parties file a status report with the court within seven days of the date of this order indicating the status of the plaintiff's application and whether Reliance had complied with the court's order prior to 5/31/08. Any failure by Reliance to comply with the deadline will result in judgment being entered in favor of the plaintiff, per the 3/31/08 order. Should the parties fail to submit a timely status report, judgment will be entered in favor of the plaintiff. Signed by District Judge Jerome B. Friedman and filed on 6/10/08. Copies mailed: 6/10/08(jcow,) (Entered: 06/10/2008)

06/12/2008	49	STATUS REPORT by Reliance Standard Life Insurance Company, Dan River Group Long-Term Disability Plan. (jcow,) (Entered: 06/12/2008)
06/13/2008	50	STATUS REPORT by Bridget Hardt. (jcow,) (Entered: 06/13/2008)
07/11/2008	51	MOTION for Attorney Fees and costs by Bridget Hardt. (jcow,) (Entered: 07/14/2008)
07/11/2008	52	Memorandum in Support re 51 MOTION for Attorney Fees and costs filed by Bridget Hardt, received. (jcow,) (Entered: 07/14/2008)
07/18/2008	53	Memorandum in Opposition re 51 MOTION for Attorney Fees filed by Reliance Standard Life Insurance Company, Dan River Group Long-Term Disability Plan, received. (jcow,) (Entered: 07/18/2008)
07/25/2008	54	REPLY to Response to Motion re 51 MOTION for Attorney Fees filed by Bridget Hardt, received. (jcow,) (Entered: 07/25/2008)

07/30/2008	55	MOTION to Strike 54 Reply to Response to Motion by Reliance Standard Life Insurance Company, Dan River Group Long-Term Disability Plan, with brief in support. (jcow,) (Entered: 07/30/2008)
08/07/2008	56	ORDER granting 51 Motion for Attorney Fees. The Court awards fees as follows: $32,830.00 in attorneys fees; $5,909.00 in paralegal fees and $410.00 in costs. The total award is $39,149.00 and judgment is entered in favor of the plaintiff at the expense of the defendant. It appearing to the court that no further legal issues remain to be resolved in this matter, the case is dismissed. Signed by District Judge Jerome B. Friedman and filed on 8/7/08. Copies mailed: 8/7/08 (jcow,) (Entered: 08/07/2008)
08/07/2008	57	JUDGMENT on decision of the court that the Plaintiffs Motion for an Award of Attorneys Fees is GRANTED. The Court awards fees as follows: $32,830.00 in attorneys fees; $5,909.00 in paralegal fees and $410.00 in costs. The total award is $39,149.00 in favor of the

		plaintiff at the expense of the defendant; entered by the clerk and filed 8/7/08, o.b., copies mailed: 8/7/08. (jcow,) (Entered: 08/07/2008)
08/13/2008	58	NOTICE OF APPEAL as to 56 Order on Motion for Attorney Fees, by Reliance Standard Life Insurance Company. (jcow,) (Entered: 08/13/2008)
08/13/2008		Transmission of Notice of Appeal, final order, judgment and Docket Sheet to US Court of Appeals re 58 Notice of Appeal; copy of notice of appeal to defendant/appellant and to counsel of record. (j cow,) (Entered: 08/13/2008)
08/18/2008		USCA Appeal Fees received $ 455, receipt number 24683000199 re 58 Notice of Appeal filed by Reliance Standard Life Insurance Company (jcow,) (Entered: 08/18/2008)

08/26/2008	USCA Case Number 08-1896; case manager: Jeffrey Neal; USCA 4th Circuit for 58 Notice of Appeal filed by Reliance Standard Life Insurance Company. (jcow,) (Entered: 08/26/2008)

RELIANCE STANDARD
Life Insurance Company

Home Office: Chicago, Illinois • Administrative Office: Philadelphia, Pennsylvania

POLICYHOLDER: Dan River Inc.

POLICY NUMBER: LSC 106257

EFFECTIVE DATE: January 1, 2002

ANNIVERSARY DATES: January 1, 2003 and each January 1 thereafter

PREMIUM DUE DATES: The first Premium is due on the Effective Date. Further Premiums are due monthly, in advance, on the first day of each month.

This Policy is delivered in Virginia and is governed by its laws.

Reliance Standard Life Insurance, Company is referred to as "we", "our" or "us" in this Policy.

The Policyholder and any subsidiaries, divisions or affiliates are referred to as "you", "your" or "yours" in this Policy.

We agree to provide insurance to you in exchange for the payment of Premium and a signed Application. This Policy provides income replacement benefits for Total Disability from Sickness or Injury. It insures those Eligible Persons for the Monthly Benefit

shown on the Schedule of Benefits. The insurance is subject to the terms and conditions of this Policy.

The Effective Date of this Policy is shown above. This Policy stays in effect as long as Premium is paid when due. The "TERMINATION OF THIS POLICY" section of the GENERAL PROVISIONS explains when the insurance terminates.

This Policy is signed by our President and Secretary.

[signed]	[signed]
SECRETARY	PRESIDENT

Countersigned _____
Licensed Resident Agent

GROUP LONG TERM DISABILITY INSURANCE
NON-PARTICIPATING

This Long Term Disability Policy replaces the Long Term Disability Policy previously issued to you by us. It is issued on January 25, 2002.

RELIANCE STANDARD LIFE INSURANCE COMPANY

Home Office: Chicago, Illinois
Administrative Office: Philadelphia, Pennsylvania

GROUP POLICY NUMBER: LSC 106257

POLICY EFFECTIVE DATE: January 1, 2002

POLICY DELIVERED IN: Virginia

ANNIVERSARY DATE: January 1 in each year

Application is made to us by: Dan River Inc.

This Application is completed in duplicate, one copy to be attached to your Policy and the other returned to us.

It is agreed that this Application takes the place of any previous application for your Policy.

Signed at _____ this _____ day of _____.

Policyholder: _____

Agent: _____

By: _____
(Signature)

_____
(Licensed Resident Agent)

_____
(Title)

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SCHEDULE OF BENEFITS

NAME OF SUBSIDIARIES, DIVISIONS OR AFFILIATES TO BE COVERED: None

ELIGIBLE CLASSES: Each active, Full-time, salaried employee except any person employed on a temporary or seasonal basis, according to the following classifications:

CLASS 1: Executive who:

(1) is engaged in a non-hazardous occupation; and

(2) functions primarily in an office environment.

CLASS 2: employee not in Class 1

WAITING PERIOD: 60 days of employment

INDIVIDUAL EFFECTIVE DATE: The day immediately following completion of the Waiting Period.

INDIVIDUAL REINSTATEMENT: 6 months

MINIMUM PARTICIPATION REQUIREMENTS: Percentage: 100% Number of Insureds: 10

LONG TERM DISABILITY BENEFIT

ELIMINATION PERIOD: 180 consecutive days of Total Disability.

MONTHLY BENEFIT: The Monthly Benefit is an amount equal to 60% of Covered Monthly Earnings,

payable in accordance with the section entitled Benefit Amount.

MINIMUM MONTHLY BENEFIT: In no event will the Monthly Benefit payable to an Insured be less than the greater of:

(1) 10% of the Covered Monthly Earnings multiplied by the Monthly Benefit percentage(s) as shown above; or

(2) $100.00

MAXIMUM MONTHLY BENEFIT: $12,500.00 (this is equal to a maximum Covered Monthly Earnings of $20,833.00).

1.0

MAXIMUM DURATION OF BENEFITS: Benefits will not accrue beyond the longer of: the Duration of Benefits; or Normal Retirement Age; specified below:

Age at Disablement	Duration of Benefits (in years)
61 or less	To Age 65
62	3-1/2
63	3
64	2-1/2
65	2
66	1-3/4
67	1-1/2
68	1-1/4
69 or more	1

OR

Normal Retirement Age as defined by the 1983 Amendments to the United States Social Security Act and determined by the Insured's year of birth, as follows:

Year of Birth	Normal Retirement Age
1937 or before	65 years
1938	65 years and 2 months
1939	65 years and 4 months
1940	65 years and 6 months
1941	65 years and 8 months
1942	65 years and 10 months
1943 thru 1954	66 years
1955	66 years and 2 months
1956	66 years and 4 months
1957	66 years and 6 months
1958	66 years and 8 months
1959	66 years and 10 months
1960 and after	67 years

CHANGES IN MONTHLY BENEFIT: Increases in the Monthly Benefit are effective on the date of the change, provided the Insured is Actively at Work on the effective date of the change. If the Insured is not Actively at Work on that date, the effective date of the change will be deferred until the date the Insured returns to Active Work.

Decreases in the Monthly Benefit are effective on the date the change occurs.

CONTRIBUTIONS: Insured: 100%

1.1

DEFINITIONS

"Actively at Work" and "Active Work" mean actually performing on a Full-time basis the material duties pertaining to his/her job in the place where and the manner in which the job is normally performed. This includes approved time off such as vacation, jury duty and funeral leave, but does not include time off as a result of an Injury or Sickness.

"Claimant" means an Insured who makes a claim for benefits under this Policy for a loss covered by this Policy as a result of an Injury to or a Sickness of the Insured.

"Covered Monthly Earnings" means the Insured's monthly salary received from you on the day just before the date of Total Disability, prior to any deductions to a 401(k) plan. Covered Monthly Earnings do not include commissions, overtime pay, bonuses or any other special compensation not received as Covered Monthly Earnings.

"Eligible Person" means a person who meets the Eligibility Requirements of this Policy.

"Elimination Period" means a period of consecutive days of Total Disability, as shown on the Schedule of Benefits page, for which no benefit is payable. It begins on the first day of Total Disability.

Interruption Period: If, during the Elimination Period, an Insured returns to Active Work for less than 30 days, than the same or related Total Disability will be treated as continuous. Days that

the Insured is Actively at Work during this interruption period will not count towards the Elimination Period. This interruption of the Elimination Period will not apply to an Insured who becomes eligible under any other group long term disability insurance plan.

"Full-time" means working for you for a minimum of 30 hours during a person's regular work week.

"Hospital" or "Institution" means a facility licensed to provide care and treatment for the condition causing the Insured's Total Disability.

"Injury" means bodily injury resulting directly from an accident, independent of all other causes. The Injury must cause Total Disability which begins while insurance coverage is in effect for the Insured.

"Insured" means a person who meets the Eligibility Requirements of this Policy and is enrolled for this insurance.

"Physician" means a duly licensed practitioner who is recognized by the law of the state in which treatment is received as qualified to treat the type of Injury or Sickness for which claim is made. The Physician may not be the Insured or a member of his/her immediate family.

"Pre-existing Condition" means any Sickness or Injury for which the Insured received medical treatment, consultation, care or services, including diagnostic procedures, or took prescribed drugs or medicines, during the 3 months immediately prior to the Insured's effective date of insurance.

"Premium" means the amount of money needed to keep this Policy in force.

"Retirement Benefits" mean money which the Insured is entitled to receive upon early or normal retirement or disability retirement under:

(1) any plan of a state, county or municipal retirement system, if such pension benefits include any credit for employment with you;

(2) Retirement Benefits under the United States Social Security Act of 1935, as amended, or under any similar plan or act; or

(3) an employer's retirement plan where payments are made in a lump sum or periodically and do not represent contributions made by an Insured.

Retirement Benefits do not include:

(1) a federal government employee pension benefit;

(2) a thrift plan;

(3) a deferred compensation plan;

(4) an individual retirement account (IRA);

(5) a tax sheltered annuity (TSA);

(6) a stock ownership plan; or

(7) a profit sharing plan

2.0

"Sickness" means illness or disease causing Total Disability which begins while insurance coverage is in effect for the Insured. Sickness includes pregnancy, childbirth, miscarriage or abortion, or any complications therefrom.

"Totally Disabled" and "Total Disability" mean, with respect to Class 1, that as a result of an Injury or Sickness, during the Elimination Period and thereafter an Insured cannot perform the material duties of his/her regular occupation;

(1) "Partially Disabled" and "Partial Disability" mean that as a result of an Injury or Sickness an Insured is capable of performing the material duties of his/her regular occupation on a part-time basis or some of the material duties on a full-time basis. An Insured who is Partially Disabled will be considered Totally Disabled, except during the Elimination Period; and

(2) "Residual Disability" means being Partially Disabled during the Elimination Period. Residual Disability will be considered Total Disability.

"Totally Disabled" and "Total Disability" mean, with respect to Class 2, that as a result of an Injury or Sickness:

(1) during the Elimination Period and for the first 24 months for which a Monthly Benefit

is payable, an Insured cannot perform the material duties of his/her regular occupation;

(a) "Partially Disabled" and "Partial Disability" mean that as a result of an Injury or Sickness an Insured is capable of performing the material duties of his/her regular occupation on a part-time basis or some of the material duties on a full-time basis. An Insured who is Partially Disabled will be considered Totally Disabled, except during the Elimination Period;

(b) "Residual Disability" means being Partially Disabled during the Elimination Period. Residual Disability will be considered Total Disability; and

(2) after a Monthly Benefit has been paid for 24 months, an Insured cannot perform the material duties of any occupation. Any occupation is one that the Insured's education, training or experience will reasonably allow. We consider the Insured Totally Disabled if due to an Injury or Sickness he or she is capable of only performing the material duties on a part-time basis or part of the material duties on a Full-time basis.

If an Insured is employed by you and requires a license for such occupation, the loss of such license for any reason does not in and of itself constitute "Total Disability".

2.1

CERTAIN RESPONSIBILITIES OF THE POLICYHOLDER

For the purposes of this Policy, you act on your behalf or as the employee's agent. Under no circumstances will you be deemed our agent.

Annual Enrollment Periods

It is your responsibility to provide us with written notice and obtain our written approval at least 31 days prior to conducting an annual enrollment period.

Compliance With Americans With Disabilities Act (ADA)

It is your responsibility to establish and maintain procedures which comply with the employer responsibilities of the Americans With Disabilities Act of 1990, as amended.

Distribution Of Certificates Of Insurance

A Certificate of Insurance will be provided to you for each Insured covered under this Policy. The Certificate will outline the insurance coverage, and explain the provisions, benefits and limitations of this Policy. It is your responsibility to distribute the appropriate Certificates and any updates or other notices from us to each Insured.

Maintenance Of Records

It is your responsibility to maintain sufficient records of each Insured's insurance, including additions, terminations and changes. We reserve the right to examine these records at the place where they are kept during normal business hours or at a place mutually agreeable to you and us. Such records must be maintained by you for at least 3 years after this Policy terminates.

Reporting Of Eligibility And Coverage Amounts

It is your responsibility to notify us on a timely basis of all individuals eligible for coverage under this Policy, of all individuals whose eligibility for coverage ends and of all changes in individual coverage amounts.

It is your responsibility to provide accurate census and salary information on all Insureds on or before each Anniversary Date, if we request such information.

Timely Payment Of Premiums

It is your responsibility to pay all premiums required under this Policy when due. Any change in the premium contribution basis must be approved by us.

3.0

TRANSFER OF INSURANCE COVERAGE

If an employee was covered under any group long term disability insurance plan maintained by you

prior to this Policy's Effective Date, that employee will be insured under this Policy, provided that he/she is Actively At Work and meets all of the requirements for being an Eligible Person under this Policy on its Effective Date.

If an employee was covered under the prior group long term disability insurance plan maintained by you prior to this Policy's Effective Date, but was not Actively at Work due to Injury or Sickness on the Effective. Date of this Policy and would otherwise qualify as an Eligible Person, coverage will be allowed under the following conditions:

(a) The employee must have been insured with the prior carrier on the date of the transfer; and

(b) Premiums must be paid; and

(c) Total Disability must begin on or after this Policy's Effective Date.

If an employee is receiving long term disability benefits, is eligible to receive such benefits, or has a period of recurrent disability under the prior group long term disability insurance plan, that employee will not be covered under this Policy. If premiums have been paid on the employee's behalf under this Policy, those premiums will be refunded.

Pre-existing Conditions Limitation Credit

If an employee is an Eligible Person on the Effective Date of this Policy, any time used to satisfy the Pre-existing Conditions Limitation of the prior group long term disability insurance plan will be credited

towards the satisfaction of the Preexisting Conditions Limitation of this Policy.

Waiting Period Credit

If an employee is an Eligible Person on the Effective Date of this Policy, any time used to satisfy any Waiting Period of the prior group long term disability insurance plan will be credited towards the satisfaction of the Waiting Period of this Policy.

Late Applicant Provision

If an employee was eligible for coverage under a prior group long term disability insurance plan issued to you for more than 31 days but did not elect to be covered under that prior plan, then he/she must submit a written application within 31 days of the Effective Date of this Policy, along with proof of health acceptable to us. If we approve the employee's application, his/her insurance will be effective on the date of our approval, provided he/she is Actively At Work on that date.

4.0

GENERAL PROVISIONS

ENTIRE CONTRACT: The entire contract between you and us is this Policy, your Application (a copy of which is attached at issue) and any attached amendments.

CHANGES: No agent has authority to change or waive any part of this Policy. To be valid, any change or waiver must be in writing, signed by either your President, a Vice President, or a Secretary. The

change or waiver must also be attached to this Policy.

TIME LIMIT ON CERTAIN DEFENSES: After this Policy has been in force for two (2) years from its Effective Date, no statement made by you shall be used to void this Policy; and no statement by any Insured on a written application for insurance shall be used to reduce or deny a claim after the Insured's insurance coverage, with respect to which claim has been made, has been in effect for two (2) years.

RECORDS MAINTAINED: You must maintain records of all insureds. Such records must show the essential data of the insurance, including new persons, terminations, changes, etc. This information must be reported to us regularly. We reserve the right to examine the insurance records maintained at the place where they are kept. This review will only take place during normal business hours.

CLERICAL ERROR: Clerical errors in connection with this Policy or delays in keeping records for this Policy, whether by you, us, or the Plan Administrator:

(1) will not terminate insurance that would otherwise have been effective; and

(2) will not continue insurance that would otherwise have ceased or should not have been in effect.

If appropriate, a fair adjustment of premium will be made to correct a clerical error.

MISSTATEMENT OF AGE: If an Insured's age is misstated, the Premium will be adjusted. If the Insured's benefit is affected by the misstated age, it will also be adjusted. The benefit will be changed to the amount the Insured is entitled to at his/her correct age.

NOT IN LIEU OF WORKER'S COMPENSATION: This Policy is not a Worker's Compensation Policy. It does not provide Worker's Compensation benefits.

CONFORMITY WITH STATE LAWS: Any section of this Policy, which on its Effective Date, conflicts with the laws of the state in which this Policy is issued, is amended by this provision. This Policy is amended to meet the minimum requirements of those laws.

CERTIFICATE OF INSURANCE: We will send to you an individual certificate for each Insured. The certificate will outline the insurance coverage, state this Policy's provisions that affect the Insured, and explain to whom benefits are payable.

TERMINATION OF THIS POLICY: You may cancel this Policy at any time by giving us written notice. This Policy will be cancelled on the date we receive your notice or, if later, the date requested in your notice.

This Policy will terminate at the end of the Grace Period if Premium has not been paid by that date.

We may cancel this Policy within thirty-one (31) days of written notice prior to the date of cancellation, only:

(1) if the number of Insureds is less than the Minimum Participation Number shown on the Schedule of Benefits; or

(2) if the percentage of Eligible Persons insured is less than the Minimum Participation Percentage shown on the Schedule of Benefits.

You will still owe us any Premium that is not paid up to the date this Policy is cancelled. We will return, pro-rata, any part of the Premium paid beyond the date this Policy is cancelled.

Termination of this Policy will not affect any claim which was covered prior to termination, subject to the terms and conditions of this Policy.

5.0

CLAIMS PROVISIONS

NOTICE OF CLAIM: Written notice must be given to us within thirty-one (31) days after a Total Disability covered by this Policy occurs, or as soon as reasonably possible. The notice should be sent to us at our Administrative Office or to our authorized agent. The notice should include your name, the Policy Number and the Insured's name.

CLAIM FORMS: When we receive the notice of claim, we will send the Claimant the claim forms to file with us. We will send them within fifteen (15)

days after we receive notice. If we do not, then proof of Total Disability will be met by giving us a written statement of the type and extent of the Total Disability. The statement must be sent within ninety (90) days after the loss began.

WRITTEN PROOF OF TOTAL DISABILITY: For any Total Disability covered by this Policy, written proof must be sent to us within ninety (90) days after the Total Disability occurs. If written proof is not given in that time, the claim will not be invalidated nor reduced if it is shown that written proof was given as soon as was reasonably possible. In any event, proof must be given within one (1) year after the Total Disability occurs, unless the Claimant is legally incapable of doing so.

PAYMENT OF CLAIMS: When we receive written proof of Total Disability covered by this Policy, we will pay any benefits due. Benefits that provide for periodic payment will be paid for each period as we become liable.

We will pay benefits to the Insured, if living, or else to his/her estate.

If the Insured has died and we have not paid all benefits due, we may pay up to $1,000.00 to any relative by blood or marriage, or to the executor or administrator of the Insured's estate. The payment will only be made to persons entitled to it. An expense incurred as a result of the Insured's last illness, death or burial will entitle a person to this payment. The payments will cease when a valid claim is made for the benefit. We will not be liable for any payment we have made in good faith.

Reliance Standard Life Insurance Company shall serve as the claims review fiduciary with respect to the insurance policy and the Plan. The claims review fiduciary has the discretionary authority to interpret the Plan and the insurance policy and to determine eligibility for benefits. Decisions by the claims review fiduciary shall be complete, final and binding on all parties.

ARBITRATION OF CLAIMS: Any claim or dispute arising from or relating to our determination regarding the Insured's Total Disability may be settled by arbitration when agreed to by the Insured and us in accordance with the Rules for Health and Accident Claims of the American Arbitration Association or by any other method agreeable to the Insured and us. In the case of a claim under an Employee Retirement Income Security Act (hereinafter referred to as ERISA) Plan, the Insured's ERISA claim appeal remedies, if applicable, must be exhausted before the claim may be submitted to arbitration. Judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction over such awards.

Unless otherwise agreed to by the Insured and us, any such award will be binding on the Insured and us for a period of twelve (12) months after it is rendered assuming that the award is not based on fraudulent information and the Insured continues to be Totally Disabled. At the end of such twelve (12) month period, the issue of Total Disability may again be submitted to arbitration in accordance with this provision.

Any costs of said arbitration proceedings levied by the American Arbitration Association or the organization or person(s) conducting the proceedings will be paid by us.

PHYSICAL EXAMINATION AND AUTOPSY: We will, at our expense, have the right to have a Claimant interviewed and/or examined:

(1) physically;

(2) psychologically; and/or

(3) psychiatrically;

to determine the existence of any Total Disability which is the basis for a claim. This right may be used as often as it is reasonably required while a claim is pending.

We can have an autopsy made unless prohibited by law.

6.0

LEGAL ACTIONS: No legal action may be brought against us to recover on this Policy within sixty (60) days after written proof of loss has been given as required by this Policy. No action may be brought after three (3) years (Kansas, five (5) years; South Carolina, six (6) years) from the time written proof of loss is received.

6.1

INDIVIDUAL ELIGIBILITY, EFFECTIVE DATE AND TERMINATION

GENERAL GROUP: The general group will be your employees and employees of any subsidiaries, divisions or affiliates named on the Schedule of Benefits page.

ELIGIBILITY REQUIREMENTS: A person is eligible for insurance under this Policy if he/she:

(1) is a member of an Eligible Class, as shown on the Schedule of Benefits page; and

(2) has completed the Waiting Period, as shown on the Schedule of Benefits page.

WAITING PERIOD: A person who is continuously employed on a Full-time basis with you for the period specified on the Schedule of Benefits page has satisfied the Waiting Period. The Waiting Period for Present Employees applies to persons who are members of the Eligible Classes on this Policy's Effective Date. The Waiting Period for Future Employees applies to persons who become members of the Eligible Classes after this Policy's Effective Date.

EFFECTIVE DATE OF INDIVIDUAL INSURANCE: If you pay the entire Premium due for an Eligible Person, the insurance for such Eligible Person will go into effect on the Individual Effective Date, as shown on the Schedule of Benefits page.

If an Eligible Person pays a part of the Premium, he/she must apply in writing for the insurance to go into effect. He/she will become insured on the latest of:

(1) the Individual Effective Date as shown on the Schedule of Benefits page, if he/she applies on or before that date;

(2) on the date he/she applies, if he/she applies within thirty-one (31) days from the date he/she first met the Eligibility Requirements; or

(3) on the date we approve any required proof of health acceptable to us. We require this proof if a person applies:

(a) after thirty-one (31) days from the date he/she first met the Eligibility Requirements; or

(b) after he/she terminated this insurance but remained in an Eligible Class as shown on the Schedule of Benefits page.

The insurance for an Eligible Person will not go into effect on a date he/she is not Actively at Work because of a Sickness or Injury. The insurance will go into effect after the person is Actively at Work for one (1) full day in an Eligible Class, as shown on the Schedule of Benefits page.

TERMINATION OF INDIVIDUAL INSURANCE: The insurance of an Insured will terminate on the first of the following to occur:

(1) the date this Policy terminates;

(2) the date the Insured ceases to meet the Eligibility Requirements;

(3) the end of the period for which Premium has been paid for the Insured; or

(4) the date the Insured enters military service (not including Reserve or National Guard).

INDIVIDUAL REINSTATEMENT: The insurance of a terminated person may be reinstated if he/she returns to Active Work with you within the period of time as shown on the Schedule of Benefits page. He/she must also be a member of an Eligible Class, as shown on the Schedule of Benefits page, and have been:

(1) on a leave of absence approved by you; or

(2) on temporary lay-off.

The person will not be required to fulfill the Eligibility Requirements of this Policy again. The insurance will go into effect after he/she returns to Active Work for one (1) full day. If a person returns after having resigned or having been discharged, he/she will be required to fulfill the Eligibility Requirements of this Policy again. If a person returns after terminating insurance at his/her request or for failure to pay Premium when due, proof of health acceptable to us must be submitted before he/she may be reinstated.

7.0

PREMIUMS

PREMIUM PAYMENT: All Premiums are to be paid by you to us, or to an authorized agent, on or before the due date. The Premium Due Dates are stated on this Policy's face page.

PREMIUM RATE: The Premium due will be the rate per $100.00 of the entire amount of Covered Monthly Earnings then in force. We will furnish to you the Premium Rate on this Policy's Effective Date and when it is changed. We have the right to change the Premium Rate:

(1) when the extent of coverage is changed by amendment;

(2) on any Premium Due Date after the second Policy Anniversary; or

(3) on any Premium Due Date on or after the first Policy Anniversary if your entire group's Covered Monthly Earnings changes by 25% or more from such group's Covered Monthly Earnings on this Policy's Effective Date.

We will not change the Premium Rate due to (2) or (3) above more than once in any twelve (12) month period. We will tell you in writing at least 31 days before the date of a change due to (2) or (3) above.

GRACE PERIOD: You may pay the Premium up to 31 days after the date it is due. This Policy stays in force during this time. If the Premium is not paid during the grace period, this Policy will terminate.

You will still owe us the Premium up to the date this Policy terminates.

WAIVER OF PREMIUM: No Premium is due us for an Insured while he/she is receiving Monthly Benefits from us. Once Monthly Benefits cease due to the end of his/her Total Disability, Premium payments must begin again if insurance is to continue.

8.0

BENEFIT PROVISIONS

INSURING CLAUSE: We will pay a Monthly Benefit if an Insured:

(1) is Totally Disabled as the result of a Sickness or Injury covered by this Policy;

(2) is under the regular care of a Physician;

(3) has completed the Elimination Period; and

(4) submits satisfactory proof of Total Disability to us.

BENEFIT AMOUNT: To figure the benefit amount payable:

(1) multiply an Insured's Covered Monthly Earnings by the benefit percentage(s), as shown on the Schedule of Benefits page;

(2) take the lesser of the amount:

(a) of step (1) above; or

(b) the Maximum Monthly Benefit, as shown on the Schedule of Benefits page; and

(3) subtract Other Income Benefits, as shown below, from step (2) above.

We will pay at least the Minimum Monthly Benefit, if any, as shown on the Schedule of Benefits page.

OTHER INCOME BENEFITS: Other Income Benefits are benefits resulting from the same Total Disability for which a Monthly Benefit is payable under this Policy, other than Retirement Benefits. These Other Income Benefits are:

(1) disability income benefits an Insured is eligible to receive under any group insurance plan(s);

(2) disability income benefits an Insured is eligible to receive under any governmental retirement system, except benefits payable under a federal government employee pension benefit;

(3) all permanent as well as temporary disability benefits, including any damages or settlement made in place of such benefits (whether or not liability is admitted) an Insured is eligible to receive under:

(a) Worker's Compensation Laws;

(b) occupational disease law;

(c) any other laws of like intent as (a) or (b) above; and

(d) any compulsory benefit law;

(4) with respect to Class 1, any of the following that the Insured is entitled to receive:

(a) wages or other compensation, excluding the amount allowable under the Rehabilitation Provision; and

(b) commissions or monies from you, including vested renewal commissions, but, excluding commissions or monies that the Insured earned prior to Total Disability which are paid after Total Disability has begun;

(5) with respect to Class 2, any of the following that the Insured is entitled to receive from you:

(a) wages, excluding the amount allowable under the Rehabilitation Provision; and

(b) commissions or monies, including vested renewal commissions, but, excluding commissions or monies that the Insured earned prior to Total Disability which are paid after Total Disability has begun;

(6) that part of disability or Retirement Benefits paid for by you that an Insured is eligible to receive under a group retirement plan; and

(7) disability or Retirement Benefits under the United States Social Security Act, the Canadian pension plans, federal or

provincial plans, or any similar law for which:

(a) an Insured is eligible to receive because of his/her Total Disability or eligibility for Retirement Benefits; and

(b) an Insured's dependents are eligible to receive due to (a) above.

Disability and early Retirement Benefits will be offset only if such benefits are elected by the Insured or do not reduce the amount of his/her accrued normal Retirement Benefits then funded.

Retirement Benefits under number 7 above will not apply to disabilities which begin after age 70 for those Insureds already receiving Social Security Retirement Benefits while continuing to work beyond age 70.

Benefits above will be estimated if the benefits:

(1) have not been applied for; or

(2) have not been awarded; and

(3) have been denied and the denial is being appealed.

The Monthly Benefit will be reduced by the estimated amount. If benefits have been estimated, the Monthly Benefit will be adjusted when we receive proof:

(1) of the amount awarded; or

(2) that benefits have been denied and the denial cannot be further appealed.

If we have underpaid the Monthly Benefit for any reason, we will make a lump sum payment. If we have overpaid the Monthly Benefit for any reason, the overpayment must be repaid to us. At our option, we may reduce the Monthly Benefit or ask for a lump sum refund. If we reduce the Monthly Benefit, the Minimum Monthly Benefit, if any, as shown on the Schedule of Benefits page, would not apply.

For each day of a period of Total Disability less than a full month, the amount payable will be 1/30th of the Monthly Benefit.

COST OF LIVING FREEZE: After the initial deduction for any Other Income Benefits, the Monthly Benefit will not be further reduced due to any cost of living increases payable under these Other Income Benefits.

LUMP SUM PAYMENTS: If Other Income Benefits are paid in a lump sum, the sum will be broken down to a monthly amount for the period of time the sum is payable. If no period of time is given, the sum will be broken down to a monthly amount for the period of time we expect the Insured to be disabled based on actuarial tables of disabled lives.

TERMINATION OF MONTHLY BENEFIT: The Monthly Benefit will stop on the earliest of:

(1) the date the Insured ceases to be Totally Disabled;

(2) the date the Insured dies;

(3) the Maximum Duration of Benefits, as shown on the Schedule of Benefits page, has ended; or

(4) the date the Insured fails to furnish the required proof of Total Disability.

RECURRENT DISABILITY: If, after a period of Total Disability for which benefits are payable, an Insured returns to Active Work for at least six (6) consecutive months, any recurrent Total Disability for the same or related cause will be part of a new period of Total Disability. A new Elimination Period must be completed before any further Monthly Benefits are payable.

If an Insured returns to Active Work for less than six (6) months, a recurrent Total Disability for a same or related cause will be part of the same Total Disability. A new Elimination Period is not required. Our liability for the entire period will be subject to the terms of this Policy for the original period of Total Disability.

This Recurrent Disability section will not apply to an Insured who becomes eligible for insurance coverage under any other group long term disability insurance plan.

9.1

WORKSITE MODIFICATION PROVISION

If an Insured is Totally Disabled, participating in a rehabilitation program and receiving a Monthly Benefit and he/she is able to return to Active Work should you make a modification to the Insured's worksite, then you may be eligible for Worksite Modification Reimbursement.

You will be reimbursed for 100% of the actual and reasonable expenses paid for eligible worksite modifications to accommodate the Insured's return to Active Work, up to a maximum reimbursement of $2,000.

Eligible worksite modifications include:

1. providing the Insured with a more accessible parking space or entrance; or

2. removing items from the worksite which represent barriers or hazards to the Insured; or

3. special seating, furniture or equipment for the Insured's work station; or

4. providing special training materials or translation services during the Insured's training; or

5. any other services that we deem necessary to help the Insured return to Active Work with you.

In order for this reimbursement to be payable, the Insured must have a Total Disability that results solely from the Insured's inability to perform his or her regular occupation at your worksite. The Insured must also have the physical and mental abilities needed to perform his or her regular occupation or another occupation at your worksite, but only with the help of the proposed worksite modification.

A worksite modification may first be proposed by either you, the Insured or his or her Physician, or by us. A written proposal must then be developed with input from you, the Insured or his or her Physician. The proposal must state the purpose of the proposed worksite modification, the times, dates and costs of the modifications. Any proposal must be in writing and is subject to our approval, your approval and the approval of the Insured prior to any reimbursement being paid.

Once the worksite modification has been approved in writing, you must make the worksite modification. Upon receipt of proof satisfactory to us that the modifications for the Insured have been made as approved and you have paid the person or organization that provided the worksite modification, we will then reimburse you up to the limit shown above.

10.0

EXCLUSIONS

We will not pay a Monthly Benefit for any Total Disability caused by:

(1) an act of war, declared or undeclared;

(2) an intentionally self-inflicted Injury;

(3) the Insured committing a felony; or

(4) an Injury or Sickness that occurs while the Insured is confined in any penal or correctional institution.

11.0

LIMITATIONS

MENTAL OR NERVOUS DISORDERS: Monthly Benefits for Total Disability caused by or contributed to by mental or nervous disorders will not be payable beyond an aggregate lifetime maximum duration of twenty-four (24) months unless the Insured is in a Hospital or Institution at the end of the twenty-four (24) month period. The Monthly Benefit will be payable while so confined, but not beyond the Maximum Duration of Benefits.

If an Insured was confined in a Hospital or Institution and:

(1) Total Disability continues beyond discharge;

(2) the confinement was during a period of Total Disability; and

(3) the period of confinement was for at least fourteen (14) consecutive days;

then upon discharge, Monthly Benefits will be payable for the greater of:

(1) the unused portion of the twenty-four (24) month period; or

(2) ninety (90) days;

but in no event beyond the Maximum Duration of Benefits, as shown on the Schedule of Benefits page.

Mental or Nervous Disorders are defined to include disorders which are diagnosed to include a condition such as:

(1) bipolar disorder (manic depressive syndrome);

(2) schizophrenia;

(3) delusional (paranoid) disorders;

(4) psychotic disorders;

(5) depressive disorders;

(6) anxiety disorders;

(7) somatoform disorders (psychosomatic illness);

(8) eating disorders; or

(9) mental illness.

SUBSTANCE ABUSE: Monthly Benefits for Total Disability due to alcoholism or drug addiction will be payable while the Insured is a participant in a Substance Abuse Rehabilitation Program. The Monthly Benefit will not be payable beyond twenty-four (24) months.

If, during a period of Total Disability due to Substance Abuse for which a Monthly Benefit is payable, an Insured is able to perform Rehabilitative Employment, the Monthly Benefit, less 50% of any of the money received from this Rehabilitative Employment will be paid until: (1) the Insured is performing all the material duties of his/her regular occupation on a full-time basis; or (2) the end of twenty-four (24) consecutive months from the date that the Elimination Period is satisfied, whichever is earlier. All terms and conditions of the Rehabilitation Benefit will apply to Rehabilitative Employment due to Substance Abuse.

"Substance Abuse" means the pattern of pathological use of a Substance which is characterized by:

(1) impairments in social and/or occupational functioning;

(2) debilitating physical condition;

(3) inability to abstain from or reduce consumption of the Substance; or

(4) the need for daily Substance use for adequate functioning.

"Substance" means alcohol and those drugs included on the Department of Health, Retardation and Hospitals' Substance Abuse list of addictive drugs, except tobacco and caffeine are excluded.

A Substance Abuse Rehabilitation Program means a program supervised by a Physician or a licensed rehabilitation specialist approved by us.

PRE-EXISTING CONDITIONS: Benefits will not be paid for a Total Disability:

(1) caused by;

(2) contributed to by; or

(3) resulting from;

a Pre-existing Condition unless the Insured has been Actively at Work for one (1) full day following the end of 12 consecutive months from the date he/she became an Insured.

12.0

SPECIFIC INDEMNITY BENEFIT

If the Insured suffers any one of the Losses listed below from an accident resulting in an Injury, we will pay a guaranteed minimum number of Monthly Benefit payments, as shown below. However:

(1) the Loss must occur within one hundred and eighty (180) days; and

(2) the Insured must live past the Elimination Period.

For Loss of:	Number of Monthly Benefit Payments:
Both Hands	46 months
Both Feet	46 months
Entire Sight in Both Eyes	46 months
Hearing in Both Ears	46 months
Speech	46 months

One Hand and One Foot	46 months
One Hand and Entire Sight in One Eye	46 months
One Foot and Entire Sight in One Eye	46 months
One Arm	35 months
One Leg	35 months
One Hand	23 months
One Foot	23 months
Entire Sight in One Eye	15 months
Hearing in One Ear	15 months

"Loss(es)" with respect to:

(1) hand or foot, means the complete severance through or above the wrist or ankle joint;

(2) arm or leg, means the complete severance through or above the elbow or knee joint; or

(3) sight, speech or hearing, means total and irrecoverable Loss thereof.

If more than one (1) Loss results from any one accident, payment will be made for the Loss for which the greatest number of Monthly Benefit payments is provided.

The amount payable is the Monthly Benefit, as shown on the Schedule of Benefits page, with no reduction from Other Income Benefits. The number of Monthly Benefit payments will not cease if the Insured returns to Active Work.

If death occurs after we begin paying Monthly Benefits, but before the Specific Indemnity Benefit has been paid according to the above schedule, the

balance remaining at time of death will be paid to the Insured's estate, unless a beneficiary is on record with us under this Policy.

Benefits may be payable longer than shown above as long as the Insured is still Totally Disabled, subject to the Maximum Duration of Benefits, as shown on the Schedule of Benefits page.

13.0

SURVIVOR BENEFIT – LUMP SUM

We will pay a benefit to an Insured's Survivor when we receive proof that the Insured died while:

(1) he/she was receiving Monthly Benefits from us; and

(2) he/she was Totally Disabled for at least one hundred and eighty (180) consecutive days.

The benefit will be an amount equal to 3 times the Insured's last Monthly Benefit. The last Monthly Benefit is the benefit the Insured was eligible to receive right before his/her death. It is not reduced by wages earned while in Rehabilitative Employment.

"Survivor" means an Insured's spouse. If the spouse dies before the Insured or if the Insured was legally separated, then the Insured's natural, legally adopted or step-children, who are under age twenty-five (25) will be the Survivor(s). If there are no eligible Survivors, payment will be made to the Insured's estate, unless a beneficiary is on record with us under this Policy.

A benefit payable to a minor may be paid to the minor's legally appointed guardian. If there is no guardian, at our option, we may pay the benefit to the adult that has, in our opinion, assumed the custody and main support of the minor. We will not be liable for any payment we have made in good faith.

14.0

WORK INCENTIVE AND CHILD CARE BENEFITS

WORK INCENTIVE BENEFIT

During the first twelve (12) months of Total Disability for which a Monthly Benefit is payable, we will not offset earnings from Rehabilitative Employment until the sum of:

(1) the Monthly Benefit prior to offsets with Other Income Benefits; and

(2) earnings from Rehabilitative Employment;

exceed 100% of the Insured's Covered Monthly Earnings. If the sum above exceeds 100% of Covered Monthly Earnings, our Benefit Amount will be reduced by such excess amount until the sum of (1) and (2) above equals 100%.

CHILD CARE BENEFIT

We will allow a Child Care Benefit to an Insured if:

(1) the Insured is receiving benefits under the Work Incentive Benefit;

(2) the Insured's Child(ren) is (are) under 14 years of age;

(3) the child care is provided by a non-relative; and

(4) the charges for child care are documented by a receipt from the caregiver, including social security number or taxpayer identification number.

During the 12 month period in which the Insured is eligible for the Work Incentive Benefit, an amount equal to actual expenses incurred for child care, up to a maximum of $250.00 per month, will be added to the Insured's Covered Monthly Earnings when calculating the Benefit Amount under the Work Incentive Benefit.

Child(ren) means: the Insured's unmarried child(ren), including any foster child, adopted child or step child who resides in the Insured's home and is financially dependent on the Insured for support and maintenance.

15.0

FAMILY AND MEDICAL LEAVE OF ABSENCE BENEFIT

We will allow the insured's coverage to continue, for up to 12 weeks in a 12 month period, if he/she is eligible for, and you have approved, a Family and Medical Leave of Absence under the terms of the Family and Medical Leave Act of 1993, as amended, for any of the following reasons:

(1) To provide care after the birth of a son or daughter; or

(2) To provide care for a son or daughter upon legal adoption; or

(3) To provide care after the placement of a foster child in the Insured's home; or

(4) To provide care to a spouse, son, daughter, or parent due to serious illness; or

(5) To take care of his/her own serious health condition as explained below.

If the Insured, due to his/her own serious health condition, meets the definition of Total Disability as well as all other requirements in this Policy, he/she will be considered Totally Disabled and eligible to receive a Monthly Benefit. All premiums will be waived as long as he/she is receiving such Monthly Benefit. If the Insured, due to his/her own serious health condition, is working on a reduced leave schedule or an intermittent leave schedule, as described by the Family and Medical Leave Act of 1993, as amended, but is not considered Totally Disabled under this Policy, premium payments will be continued under this benefit.

The Insured will not qualify for the Family and Medical Leave of Absence Benefit unless we have received proof from you, in a form satisfactory to us, that the Insured has been granted a leave under the terms of the Family and Medical Leave Act of 1993, as amended. Such proof: (1) must outline the terms of the Insured's leave; and (2) give the date the leave

began; and (3) the date it is expected to end; and (4) must be received by us within thirty-one (31) days after a claim for benefits has been filed with us.

If you grant the Insured a Family and Medical Leave of Absence, the following applies to the Insured who has been granted the leave:

(1) While the Insured is on an approved Family and Medical Leave of Absence, the required premium must be paid according to the terms specified in this Policy to keep the insurance in force.

(2) While the Insured is on an approved Family and Medical Leave of Absence, he will be considered Actively at Work in all instances unless such leave is due to his/her own illness, injury, or disability. Changes such as revisions to coverage because of age, class, or salary changes will apply during the leave except that increases in amount of insurance, whether automatic or subject to election, are not effective for an Insured who is not Actively at Work until such time as he/she returns to Active Work for one full day.

(3) If the Insured becomes Totally Disabled while on a Family and Medical Leave of Absence, any Monthly Benefit which becomes payable will be based on the Insured's Covered Monthly Earnings received from you immediately prior to the date of Total Disability.

(4) Coverage will terminate for any Insured who does not return to work as scheduled according to the terms of his/her agreement with you. In no case will coverage be extended under this benefit beyond 12 weeks in a 12 month period. Insurance will not be terminated for an Insured who becomes Totally Disabled during the period of the leave and who is eligible for benefits according to the terms of this Policy.

All other terms and conditions of this Policy will remain in force while an Insured is on an approved Family and Medical Leave of Absence.

MILITARY SERVICES LEAVE OF ABSENCE COVERAGE

We will allow the Insured's coverage to continue, for up to 12 weeks in a 12 month period, if the Insured enters the military service of the United States. While the Insured is on a Military Services Leave of Absence, the required premium must be paid according to the terms specified in this Policy to keep the insurance in force. Changes such as revisions to coverage because of age, class or salary changes will apply during the leave except that increases in amount of insurance, whether automatic or subject to election, are not effective for such an Insured until he/she has returned to work from

Military Services Leave of Absence for one full day. All other terms and conditions of this Policy will remain in force during this continuation period. The

Insured's continued coverage will cease on the earliest of the following dates:

(1) the date this Policy terminates; or

(2) the date ending the last period for which any required premium was paid; or

(3) 12 weeks from the date the Insured's continued coverage began.

This Policy, however, does not cover any loss which occurs while on active duty in the military service if such loss is caused by or arises out of such military service, including but not limited to war or act of war (whether declared or undeclared) and is also subject to any other exclusions listed in the Exclusions provision.

16.1

EXTENDED DISABILITY BENEFIT

We will pay an Extended Disability Benefit to an Insured if the Insured:

(1) meets all the requirements of Total Disability of this Policy; and

(2) is receiving a Total Disability Benefit under this Policy that will be exhausted because the Maximum Duration of Benefits has ended; and

(3) is unable to function without another person's Direct Assistance or verbal direction due to:

(a) an inability to perform at least two Activities of Daily Living (ADL) as defined; or

(b) Cognitive Impairment as defined; and

(4) is either:

(a) confined as an Inpatient in a Skilled Nursing Home, Rehabilitation Facility or Rehabilitative Hospital in which patients receive care from licensed medical professionals; or

(b) receiving Home Health Care or Hospice Care; and

(5) makes a Written Request for this benefit within thirty (30) days after the Maximum Duration of Benefits has ended.

The Extended Disability Benefit:

(1) will be an amount equal to 85% of the Monthly Benefit after offsets with Other Income Benefits which was payable prior to the Insured qualifying for the Extended Disability Benefit up to a maximum of $5,000 per month; and

(2) is payable for a maximum of sixty (60) months measured from the date that the Maximum Duration of Benefits has ended.

Definitions:

"Activities of Daily Living (ADL)" means:

(1) Bathing - the ability to wash oneself in the tub or shower or by sponge bath from a basin without Direct Assistance;

(2) Dressing - the ability to change clothes without Direct Assistance, including fastening and unfastening any medically necessary braces or artificial limbs;

(3) Eating/Feeding - the ability to eat without Direct Assistance, once food has been prepared and made available;

(4) Transferring - the ability to move in and out of a chair or bed without Direct Assistance, except with the aid of equipment (including support and other mechanical devices); and

(5) Toileting - the ability to get to and from and on and off the toilet, to maintain a reasonable level of personal hygiene and to adjust clothing without Direct Assistance.

"Cognitively impaired" and "Cognitive Impairment" means the Insured's confusion or disorientation due to organic changes in the brain resulting in a deterioration or loss in intellectual capacity as confirmed by cognitive or other tests satisfactory to us.

"Direct Assistance" means the insured requires continuous help or oversight to be able to perform the Activity of Daily Living (ADL).

"Home Health Care" means medical and non-medical services, provided in an Insured's residence due to Injury or Sickness, including: visiting nurse services;

physical, respiratory, occupational or speech therapy; nutritional counseling; and home health aide services. Home Health Care services must be: (1) prescribed by and provided under the supervision of a Physician; and (2) rendered by a licensed home health care provider who is not a member of the insured's immediate family. Home Health Care does not include: homemaker, companion and home delivered meals services; nor informal care services provided by family members of the Insured.

17.0

"Hospice Care" means a program of care which coordinates the special needs of a person with a Terminal Illness. Hospice Care must be: (1) prescribed by and provided under the supervision of a Physician; and (2) rendered by a licensed hospice care provider who is not a member of the Insured's immediate family.

"Inpatient" means a person confined in a Skilled Nursing Home, Rehabilitation Facility or Rehabilitative Hospital, for whom a daily room and board charge is made.

17.1

REHABILITATION BENEFIT

"Rehabilitative Employment" means work in any gainful occupation for which the Insured's training, education or experience will reasonably allow. The work must be supervised by a Physician or a licensed or certified rehabilitation specialist approved by us. Rehabilitative Employment includes work performed

while Partially Disabled, but does not include performing all the material duties of his/her regular occupation on a full-time basis.

If an Insured is receiving a Monthly Benefit because he/she is considered Totally Disabled under the terms of this Policy and is able to perform Rehabilitative Employment, we will continue to pay the Monthly Benefit less an amount equal to 50% of earnings received through such Rehabilitative Employment.

If an Insured is able to perform Rehabilitative Employment when Totally Disabled due to Substance Abuse, we will continue to pay the Monthly Benefit less an amount equal to 50% of earnings received through such Rehabilitative Employment. This Monthly Benefit is payable for a maximum of twenty-four (24) consecutive months from the date the Elimination Period is satisfied.

An Insured will be considered able to perform Rehabilitative Employment if a Physician or licensed or certified rehabilitation specialist approved by us determines that he/she can perform such employment. If an Insured refuses such Rehabilitative Employment, or has been performing Rehabilitative Employment and refuses to continue such employment, the Monthly Benefit will be reduced by 50%, without regard to the Minimum Monthly Benefit.

RELIANCE STANDARD
Life Insurance Company

2001 Market Street,
Suite 1500
Philadelphia, PA
19103-7090
(267) 256-3500
(800) 351-7500

September 18, 2003

Ms. Bridget Hardt

Re:	Policy No:	LSC 106,257
	Claim No:	2003 223 010
	Policyholder:	Dan River Inc.

Dear Ms. Hardt:

Reliance Standard Life Insurance Company is pleased to be of service to you at this time. Your claim for Long Term Disability (LTD) benefits has been approved.

Based on the information received we have determined that you meet the group policy's definition of Total Disability for your occupation. Benefits commence after an elimination period of 180 days and are payable monthly in arrears. As your disability began on 1/24/03, your Elimination Period was satisfied on 7/23/03. Under separate cover you will receive your initial LTD payment representing benefits due from 7/23/03 to 9/23/03. You can expect future benefits on or about the 23rd day of each month provided that you remain Totally Disabled as defined by the group policy. Your monthly benefit is $3120.00 payable in accordance

with the terms of the group policy. This benefit was calculated in the following manner:

Monthly Eligible	:	$3,120.00
Salary @ 60%	:	
Less Estimated Social	:	$deferred at this time
Security Disability	:	
Monthly Benefit	:	$3,120.00

Periodic documentation of your disability status will be required for further benefit consideration. Medical documentation of your continuous disability must be provided by the physician who is treating you and satisfactory to us. Supplementary forms will be sent to you periodically with appropriate instructions for completion.

We are requesting an script for a Functional Capacities Evaluation (FCE) from Dr. Miller. When we receive this script, an appointment will be made by RSL for the FCE, you will be contacted.

According to your group policy, if your Social Security Disability (SSD) application has not been processed, we are required to estimate the amount of your award and reduce your monthly LTD benefit by that estimated amount. Given your date of disability, SSD benefits would be payable to you starting 7/1/03. As such, LTD benefits payable by Reliance Standard Life Insurance Company will be reduced by your estimated SSD award starting on that date. Please consult the certificate of insurance from your employer regarding this provision.

We are not taking the estimated SSD offset at this time, we will review periodically and advise accordingly.

RELIANCE STANDARD
Life Insurance Company

2001 Market Street,
Suite 1500
Philadelphia, PA
19103-7090
(267) 256-3500
(800) 351-7500

You are required to send us a copy of your Social Security application and keep us advised of the status of your claim. An addressed envelope is enclosed for returning this information.

Your group policy further stipulates that in order to be eligible for Long Term Disability Benefits beyond 24 months you must be totally disabled from performing the material duties of Any Occupation. Totally Disabled and Total Disability will generally mean that as result of an injury or sickness an Insured cannot perform the material duties of Any Occupation. Any Occupation is one that the Insured's education, training or experience will reasonably allow.

If you continue to meet your group policy's definition of Total Disability, you will reach the 24th month on 7/23/05. An investigation will begin prior to this date in order to gather the necessary information to determine your continued eligibility for Long Term Disability benefits. The above is a summary of your group policy provision. For a more detailed description of all policy provisions, please refer to your LTD certificate of group insurance.

Should your disability or work status change, please notify us immediately. If you have any questions, please do not hesitate to contact us.

Sincerely,

Alberta Hendricks, Examiner
LTD Claims Department
Ext. 3714

cc: G. Stitt

Enclosure

RELIANCE STANDARD
Life Insurance Company

Disability Claims
Department
P.O. Box 8330
Philadelphia, PA
19101-8330
(267) 256-3500
(800) 351-7500

March 27, 2006

Karen M. Rye
Attorney at Law
3601 Shore Drive – Suite 101
Virginia Beach, VA 23455

Re: Bridget Hardt
Long Term Disability
Claim No. 2003-223-010
Policy No: LSC 106257

Dear Ms. Rye:

We are writing regarding the appeal of our decision to terminate Ms. Hardt's claim for Long Term Disability benefits. Please be advised that Reliance Standard Life Insurance Company ("RSL") strives to treat all claimants fairly and evaluate claims submitted to us in an objective and equitable manner.

Ms. Hardt is entitled to an independent review of the claim facts and the determination made regarding her eligibility for benefits. The file was referred to our Quality Review Unit to conduct such a review. This review has been conducted separately from the

individual(s) who made the original decision to terminate benefits.

We have completed our review of the claim file and have found that our original decision to terminate benefits was appropriate. We have determined that Ms. Hardt is not entitled to additional disability benefits because she does not satisfy the definition of total disability in the policy.

According to her policy, "Totally Disabled" and "Total Disability" mean, that as the result of an Injury or Sickness:

(1) during the Elimination Period and for the first 24 months for which a monthly benefit is payable, an Insured cannot perform the material duties of his/her regular occupation.

(A) "Partially Disabled" and "Partial Disability" mean that, as the result of an Injury or Sickness , an Insured is capable of performing the material duties of his/her regular occupation on a part-time basis or some of the material duties on a full-time basis. An Insured who is Partially Disabled will be considered Totally Disabled, except during the Elimination Period.

(B) "Residual Disability" means being Partially Disabled during the Elimination Period. Residual Disability will be considered Total Disability; and

(2) after a Monthly Benefit has been paid for 24 months, an Insured cannot perform the material duties of any occupation. Any occupation is one that the Insured's education, training or experience will reasonably allow. We consider the Insured "Totally Disabled" if, due an Injury or Sickness, he or she is capable of only performing the material duties on a part-time basis or part of the material duties on a full time basis.

Ms. Hardt was working as an Executive Assistant when she became disabled on January 23, 2003 with complaints of numbness, tingling, loss of feeling and extreme pain in both hands, arms, shoulders secondary to bilateral carpal tunnel syndrome and moderate degenerative disc disease of the cervical spine at C5-6 and C6-7. She underwent a carpal tunnel release on both wrists in 2001 and had "redo" surgery on the right wrist on March 18, 2003. She continued to complain of systemic pain and neuropathy. On October 13, 2003 she underwent a Functional Capacities Evaluation (FCE) which demonstrated decreased right hand strength and dexterity and neck and right upper extremity pain. It was noted that Ms. Hardt "reports neck pain with prolonged sitting, with head supported, pain radiates down the rt. upper extremity". The FCE established that she would be capable of performing sedentary work.

On December 18, 2003, she was advised that her claim was being terminated based on the results of the FCE which established that she could perform work at the sedentary level of physical demand. It

was noted that her regular occupation as an Executive Assistant would be considered sedentary and, therefore, the findings of the FCE support the conclusion that she could do her own occupation. You subsequently filed an appeal on her behalf. In your letter, you argued that

- The FCE was not performed by a physician.
- The correct DOT would be Executive Secretary, not Secretary. "The employer stated the job could not be modified or any accommodation offered to allow her to return to her occupation."
- She is incapable of lifting 10 pounds, a physical capacity required at the sedentary level. Also, "most sedentary jobs require bilateral, manual dexterity and she does not possess that ability."
- The FCE was limited to her hands and did not take into account her "overall neuropathy."
- Her physical condition had not improved since her claim was first approved.

You provided copies of additional medical records from Dr. Gilbert Snider, Dr. Beth Winke, Chesapeake Diagnostic Imaging and a medical report from Dr. Julius Miller. On June 3, 2004 you were advised that the decision terminating your client's claim was being reversed on appeal because the decision was not supported by the vocational information. An analysis of her occupational duties

by our Vocational specialist determined that the restrictions and limitations identified by the FCE would preclude functioning at her occupation because it required frequent bi-manual activity which the FCE documented she would not be able to do.

On July 27, 2004, our internal Vocational specialist performed a Residual Employability Analysis (Transferable Skills Analysis) and identified several sedentary occupations commensurate with Ms. Hardt's work history and residual work capacity. These included Customer Complaint Clerk, Information Clerk, Court Clerk and Tourist Information Clerk. Ms Hardt's file was subsequently referred to an outside Vocational specialist, Robert Jackson, to perform a vocational assessment. In his September 24, 2004 report, Mr. Jackson noted he was asked to perform a labor market survey taking into account the alternative occupations previously identified. Mr. Jackson concluded that "clearly, the FCE indicates severe limitations involving the use of either hand....Her pre-disability occupation is not a vocational option at this time...Clearly, Mrs. Hardt will require a position involving little to no use of the upper extremities. A current opening that fits this profile has not yet been identified in her local labor market."

After reviewing the medical records on February 25, 2005, a member of our medical staff conclude that the physical capacities relating to upper extremity use as outlined in the October 2003 FCE remained supported, but, in addition, Ms. Hardt would be limited to occasional standing and walking. These limits were not expected to improve. The Vocational

specialist was then asked to review his July 27, 2004 Residual Employability Analysis to determine if this latest medical opinion would warrant any revisions to his earlier findings. The specialist concluded that the alternative occupations identified by the Residual Employability Analysis remained valid "since there is no change in the exertional level" and she continued with a sedentary work capacity.

On April 19, 2005 Ms. Hardt was advised that her claim was being terminated with benefits paid to July 23, 2005, the date the definition of total disability changed from the inability to perform her own occupation to the inability to perform any occupation. It was noted that a review of the medical records established she could not perform her regular sedentary occupation but could perform other types of sedentary work such as Customer Complaint Clerk and Court Clerk.

In your letter appealing this decision, you argued that Ms. Hardt cannot perform the duties of any gainful occupation, that RSL was acting in bad faith because there has been no change in Ms. Hardt's condition since her disability began and "there is no medical opinion to support the allegation that Ms. Hardt can perform the material duties of any gainful occupation. You also stated the "determination fails to give proper deference to the finding of the Social Security Administration which administers a substantially similar, if not more difficult test for disability." Finally, you contend that RLS's decision is "arbitrary and capricious" because "the denial acknowledges the SSA decision and predicates the requirement to reimburse based upon an overpayment by virtue of qualifying for benefits, but

ignores the decision as to the substantive holding as to disability."

While information relating to the award of Social Security Disability (SSDI) benefits is certainly considered in our evaluation of a disability claim, the receipt of such benefits does not guarantee that an individual will be awarded LTD benefits from RSL (and vice versa). A person's entitlement to each of these benefits is based upon a different set of guidelines which sometimes leads to differing conclusions. We note that, in awarding Ms. Hardt SSDI benefits, the Administrative Law Judge stated there was no evidence of any "severe" impairment but he concludes her residual functional ability would prevent her from performing her regular occupation. Regarding her ability to perform other work, he notes that she was 58 years old at the onset of disability and would be considered a person of "advanced age". He goes on to state that "there is no evidence that she has any work skills transferable to jobs within her current residual functional capacity. "As Mr. Hardt is capable of performing no more than sedentary work, a finding of "disabled" is directed by Medical-Vocational Rule 201.06." While we do not dispute his conclusion that Ms. Hardt cannot perform the duties of her regular occupation, we strongly disagree with his opinion that she lacks transferable skills "within her current residual functional capacity". As noted above, our Vocational specialist performed an independent analysis of her background and physical restrictions and came to a contrary conclusion.

After we received the appeal, arrangements were made to have Ms. Hardt undergo an FCE to

determine if her physical limitations would preclude any work capacity. She underwent the FCE on December 29, 2005 but failed to give maximum effort, rendering the results invalid. A second FCE was then scheduled for January 26, 2006. Once again, she did not provide maximum effort. Copies of both FCEs were previously mailed to you. Since we were unable to determine her functional work capacity via the FCEs, her filed was referred to Dr. Michael Leibowitz, a Board Certified Physiatrist (Physical Medicine and Rehabilitation specialist) for review. A copy of his March 4, 2006 report is enclosed. Dr. Leibowitz concludes Ms. Hardt is capable of full time sedentary work with hand carrying limited to less than 10 pounds occasionally and occasional standing and ambulating with a cane. Our Vocational specialist was asked to comment on this and determine if the alternative occupations mentioned above remain viable. Enclosed is a copy of his March 24 response. He opines that the physical restrictions outlined by Dr. Leibowitz would not preclude working at those occupations. We also asked the Vocational specialist to arrange for a Labor Market Survey to ascertain whether there would be any appropriate employment opportunities. You will note from the March 10, 2006 report (enclosed) that such positions were identified.

Since it has been determined that Ms. Hardt is capable of performing alternative sedentary occupations and since such occupations which would accommodate her physical limitations have been identified, she would not be considered totally disabled from performing any work and would, therefore, not satisfy the definition of total disability.

Consequently, no additional benefits would be payable.

We regret that our decision could not have been more favorable; however, we are limited by the provisions of the policy. Please be advised that our claim decision is now final, as you have exhausted any administrative remedies available.

Nothing in this letter should be construed as a waiver of any RSL's rights and defenses under the above captioned policy, and all of these rights and defenses are reserved to the Company, whether or not specifically mentioned herein.

In the event that Ms. Hardt' s claim is subject to the Employee Retirement Income Security Act of 1974 ("The Act"), she has the right to bring civil action under section 502(a) of the Act following an adverse benefit determination on review. Her plan may have other voluntary alternative dispute resolution options such as mediation. One way to find out what may be available is to contact her local U.S. Department of Labor Office and her State insurance regulatory agency.

Sincerely,

Robert O'Neill
Sr. Benefits Analyst
Quality Review Unit

[ENTERED: MARCH 5, 2007]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

BRIDGET HARDT,

Plaintiff,

vs. **Civil Action No. 2:07cv105**

RELIANCE STANDARD LIFE INSURANCE COMPANY,

Defendant

SERVE: **Registered Agent**
CT Corporation System
4701 Cox Road, Suite 301
Glen Allen, VA 23060-6802

and

DAN RIVER GROUP LONG-TERM DISABILITY PLAN

SERVE: **Harry L. Goodrich,**
Registered Agent
Dan River Inc.
2291 Memorial Drive
Danville, VA 24541

COMPLAINT

COMES NOW Bridget Hardt, the Plaintiff, by counsel, and for her Complaint, states the following:

1. Plaintiff brings this action pursuant to the Employee Retirement Income Security Act of 1874, 29 U.S.C. §§ 1000 et seq. This action is also based on diversity of citizenship and an amount in controversy in excess of $75,000.00.

2. Jurisdiction of this Court is invoked pursuant to 29 U.S.C. § 1132(e). Jurisdiction is also founded on diversity of citizenship and an amount in controversy in excess of $75,000.00.

3. The applicable standard of review is *de novo*.

The Parties

4. Plaintiff, Bridget Hardt, is an individual who currently resides in the City of Chesapeake, Virginia.

5. The Defendant, Reliance Standard Life Insurance Company ("Reliance"), is an Illinois corporation with its principal place of business at 115 South LaSalle Street, Chicago, Illinois.

6. The Defendant, Dan River Inc. Group Long-Term Disability Insurance Program Plan ("the Plan") is the Long-Term Disability Plan in which Ms. Hardt enrolled as an employee of Dan River Inc. Dan River Inc. is a Georgia Corporation with offices in Virginia.

7. The Plan, together with the summary plan description, is an employee welfare benefit plan as defined in 29 U.S.C. § 1002(1), and is subject to various provisions of the Employee Retirement Income Security Act, including the enforcement provisions of that Act. A true and correct copy of the summary plan description is attached hereto as Exhibit A.

Background

8. The Plan is underwritten by Reliance Standard Life Insurance Company, Inc.

9. Defendant Dan River is the listed Plan Administrator.

10. Defendant Reliance currently influences, controls and funds the plan.

11. The policy defines Total disability as "that as a result of an Injury or Sickness (1) during the Elimination Period and for the first 24 months for which a Monthly Benefit is payable, an insured cannot perform the material duties of his/her regular occupation; and (2) after a Monthly Benefit has been paid for 24 months, an Insured cannot perform the material duties of any occupation. Any occupation is one that the Insured's education, training or experience will reasonably allow. We consider the Insured Totally Disabled if due to an Injury or Sickness he or she is capable of only performing the material duties on a part-time basis or part of the material duties on a Full-time basis." A true and correct copy of the Plan is attached hereto as Exhibit B.

12. Ms. Hardt was born in 1945. She is currently 62 years old.

13. In 1994, Ms. Hardt entered the employ of Import Specialist, Inc., based in Portsmouth, Virginia.

14. In 2000, Ms. Hardt became an employee of Dan River Inc. when, during an expansion of its textile business, Dan River acquired Import Specialist, Inc.'s Portsmouth, Virginia facility.

15. During the period of Ms. Hardt's employment with Dan River Inc., Ms. Hardt participated as a contributing member in the Plan.

16. Ms. Hardt remained in the continuing and unbroken employ of Dan River Inc. until 2003.

17. At all times relevant hereto, Ms. Hardt was the Executive Assistant to the President for Dan River Inc. - ISP. Dan River Inc.'s job description for Ms. Hardt states that she: "... manages ISP company-wide activities, including sales/marketing, has direct communication with buyers, sales staff and Customer Service. She follows up on correspondence and emails, handles telephone calls, makes travel arrangements and assists with product development and sampling of new products. She travels to shows in New York, is responsible for filing all correspondence for the entire office, supervises at least two staff members directly and, when necessary, is responsible for art/product development when management is absent." As the Executive Assistant to the President, Ms. Hardt

traveled extensively as a result of her employment. Ms. Hardt not only was responsible for the business communications between the president and the staff, she also supervised and approved purchasing of all office and warehouse materials and supplies, held numerous discussions with various buyers and divisional merchandise managers of major retailers, assisted with and attended textile shows and meetings, and handled all the administrative and secretarial duties relating to the president's position. Such duties were material and substantial to the performance of her occupation.

18. Commencing in July of 2000 and continuing, Ms. Hardt was seen by Julius S. Miller, M.D., F.A.C.P., Internal Medicine, for pain in her neck and left shoulder, and was treated for general medical problems "as well as pain in bilateral blades, low back pain, arthralgias, neck pain radiating to her right shoulder and arm, and regarding bilateral carpal tunnel syndrome"

19. Ms. Hardt was referred to Beth M. Winke, M.D., a Physical Medicine & Rehabilitation specialist, and on January 8, 2001, Dr. Winke performed an electromyography/nerve conduction ("EMG/NRV") test of the left upper extremity on Ms. Hardt.

20. On January 15, 2001, Ms. Hardt filled out the Employer's Accident report, stating she was feeling "Numbness, tingling, loss of feeling, pain in both hands, arms shoulders and neck."

21. She was then referred to Joan H. Rose, M.D., a hand surgeon, who, after examination, filed an Activity Status report on January 29, 2001, stating Ms. Hardt would be out of work six weeks from February 27, 2001. On February 2, 2001, Ms. Hardt saw Dr. Miller, who wrote a letter indicating that Ms. Hardt was unable to perform her duties." On February 27, 2001, Ms. Hardt had surgery on her left wrist, and was deemed disabled. Her employer, Dan River Inc., continued to pay Ms. Hardt her salary.

22. In April, 2001, Ms. Hardt, who was still experiencing pain in her upper body extremities, went for another EMG/NRV test performed on her right upper extremity by Robert J. Lanoue, M.D., a neurology specialist. Dr. Lanoue's report, as referenced by Dr. Leibowitz, found "right carpal tunnel syndrome", and reported it as an "abnormal study with lesion affecting fibers of the median nerve" on the right wrist.

23. On May 2, 2001, Ms. Hardt returned to work full time until January 22, 2003, when her pain from the neuropathy became unbearable. Her condition rendered Ms. Hardt disabled.

24. On January 24, 2003, Ms. Hardt completed, along with her attending physician Dr. Miller, an FMLA form for Dan River Inc., indicating her nature of illness as: "Pain & numbness in right hand - including upper extremity, arm, shoulder, neck." In his portion of the report, Dr. Miller indicates his diagnosis and present condition as "RT severe median neuropathy' and states that his

patient is "... unable to fill the duties of his job as noted above" and checked the "NO" box indicating "employee is able to perform work of any kind?"

25. On January 31, 2003, Ms. Hardt underwent another EMG/NRV study with Dr. Winke, whose report noted chronic changes in the right abductor pollicis brevis muscle, that this was an abnormal study, and, as Dr. Leibowitz noted in his report, there was "Electrodiagnostic evidence of right median neuropathy at the wrist to a severe degree." Ms. Hardt underwent a second Carpal Tunnel Release surgery with Dr. Rose on January 24, 2003.

26. On June 3, 2003, Ms. Hardt underwent an MRI of her cervical spine for continuing pain in her neck, shoulder and upper extremity. The MRI report, as noted by Dr. Leibowitz in his report, "demonstrated degenerative disc disease primarily at C5-C6 and C6-C7 moderate in degree, and mild-to-moderate degenerative foraminal narrowing bilaterally at C5-C6 and C6-C7."

27. In addition to the symptoms directly related to the carpal tunnel syndrome in Ms. Hardt's wrists, she experienced and continues to experience pain in her upper back, right shoulder area and neck. For a period of time, a definitive diagnosis was not rendered, but in 2004, Gilbert M. Snider, M.D., a Neurologist, was finally able to identify the cause of Ms. Hardt's continuing pain as hereditary small fiber neuropathy. This condition is a chronic disease.

28. On or about August 15, 2003, Ms. Hardt timely filed her claim forms for total disability benefits and the same were received by Reliance. A true and correct copy of Ms. Hardt's Disability Claim form is attached as Exhibit C (redacted per Local Rule 7).

29. By correspondence dated September 18, 2003, Reliance informed Ms. Hardt that it approved her claim for disability benefits. A true and correct copy is attached hereto as Exhibit D (redacted per Local Rule 7).

30. Ms. Hardt continued to receive disability benefits in the amount of $3120.00 per month through December 23, 2003.

31. By correspondence dated December 8, 2003, Reliance informed Ms. Hardt of its adverse determination for continued long-term total disability benefits under the Plan. A true and accurate copy of this correspondence is attached hereto as Exhibit E (redacted per Local Rule 7).

32. In reaching the conclusion to deny Ms. Hardt benefits under the Plan, Reliance concluded that Ms. Hardt's occupation was sedentary and that she "would not be precluded from the performance of sedentary work activity, which is a level consistent with your regular occupation of Executive Assistant to President." See Exhibit E.

33. In May, 2004, Ms. Hardt requested a review of her denial of long-term total disability benefits from Reliance.

34. On June 3, 2004, Reliance determined Ms. Hardt would be precluded from performing her own occupation, thus overturning the denial and reinstating benefits for the period of December 23, 2003 through May 23, 2004. A true and correct copy of this reinstatement is attached as Exhibit F.

35. On February 16, 2005, Ms. Hardt was awarded Social Security Disability benefits in the amount of $1,491.00 per month. The Social Security Administration stated that Ms. Hardt "has had a combination of impairments that makes it impossible for her to return to her former employment or make an adjustment to other work." A true and accurate copy of the award is attached as Exhibit G (redacted per Local Rule 7).

36. On April 19, 2005, Reliance determined Ms. Hardt no longer met the definition of total disability and stated she was "not totally disabled from performing the material duties of Any Occupation, as is defined in your policy," and denied benefits beyond August 23, 2005. A true and correct copy of this denial letter is attached as Exhibit H (redacted per Local Rule 7).

37. Ms. Hardt has experienced no improvement in her condition, and the neuropathy disease is chronic and progressive.

38. On or about September 28, 2005, Reliance accepted and acknowledged the benefit of the Social Security Award and offset her payments and reduced her total benefit. Reliance received

repayment of $14,913.23 based on the Social Security Total Disability Award from Ms. Hardt.

39. On October 31, 2005, Ms. Hardt supplemented her long-term disability benefit file by sending an Impairment Questionnaire of Dr. Miller dated October 17, 2005, requesting the medical report be added to her appeal. A true and correct copy of this letter is attached as Exhibit I.

40. On March 27, 2006, Reliance denied Ms. Hardt's continuing long-term total disability benefits on the basis that Ms. Hardt "does not satisfy the definition of total disability in the policy." A true and correct copy is attached as Exhibit J.

41. In reaching the conclusion to deny Ms. Hardt's benefits under the Plan, Reliance:

(a) failed to consider all the medical evidence, *inter alia*,

(1) the additional medical records submitted by Ms. Hardt from Dr. Miller dated January 27, 2006 and the Impairment Questionnaire of Dr. Miller dated October 17, 2005 wherein Dr. Miller stated Ms. Hardt was unable to meet her own occupation or any occupation,

(2) any Impairment Questionnaires submitted by Ms. Hardt's physicians, including Dr. Snider's of January 14, 2005. In this report, Dr. Snider specifically indicated Ms. Hardt has frequent

interference with attention and concentration, that her impairments have persisted continuously at least from January 22, 2003, and that Ms. Hardt would have difficulty working at a regular job on a sustained basis, including limitations on her ability to walk, sit or stand due to her impairments,

(3) any medical records from any attending physician from August 6, 2003 until February 26, 2004,

(4) failed to consider, Ms. Hardt's "increasing numbness and tingling in hands/feet" or Dr. Snider's note of "minimal diminution of vibratory sensation in bilateral toes, diminished pinprick in knees/elbows bilaterally and hypersensitivity to light touch in feet/hands";

(5) Ms. Hardt's medical conditions in conjunction with one another, specifically the carpal tunnel syndrome in both wrists, and the degenerative disc disease in her neck, the athrosis in her left shoulder (as evidenced by the MRI in 2002), and the hereditary small fiber neuropathy impairments, which are chronic conditions; and refused to consider any information about Ms. Hardt's severe neck, shoulder, arm, upper and lower extremity neuropathic conditions on which the basis of her claim is made, indicating that it was

evaluating her for her right wrist condition post-carpal tunnel release only;

(b) failed to consider the deleterious effects of Ms. Hardt's medications, noting particulary, when Reliance vocational representative Lembach spoke directly with Ms. Hardt and noted his file that Ms. Hardt is taking medications and is forgetful on June 17, 2004, and in the June 25, 2004 Event Report, Examiner Alberta Hendricks noted that Ms. Hardt's medications cause her to feel confusion;

(c) failed to follow their own written procedures (Exhibit K) in preparing the clinical review of Ms. Hardt, specifically:

(1) by not advising Ms. Hardt at the time of the initial claim determination "that absent a change in circumstances, they likely will not satisfy the applicable definition of total disability from any occupation. In the event of any change in circumstances, the claim would need to be reevaluated."

(2) in failing to send a letter to the attending physician requesting the completion of a current Physical Capacities Assessment (or other information/form) as well as current medical records and test results, in direct violation of Procedure "Any Occupation Procedures", Page C4.1.

(3) relied upon a Physical Capacities Assessment Questionnaire (dated October 13, 2003) which was not executed by the attending physician and only evaluated Ms. Hardt's hands, wrists and manual dexterity, not her total body function.

(4) failed to request any additional data that may still be missing and/or needed, in direct violation of Procedure "Any Occupation Procedures", Page C4.2.

(5) failed to follow "Any Occupation" written procedures with regard to when a claimant will "not meet the definition of totally disabled from any occupation and the file documentation suggest *full time* work capacity by failing to evaluate whether a referral for a Transferable Skills Analysis (TSA) may be necessary; and if so, referring the file to the Vocational Specialist to determine if a TSA (or other) vocational analysis is necessary. If the information indicates that the claimant is only capable of part time work, investigate the potential of full time work. If full time work is not a possibility, the claimant may be totally disabled and a TSA may not be required..." Reliance already had Robert W. Jackson, LMFT at Commonwealth Rehabilitation's report dated September 24, 2004, which indicated that "the two standardized tests of manual dexterity were administered to Mrs. Hardt, and all areas measured with the right dominant

hand were below the 1st percentile. All areas measured with the left hand were below the 1st percentile, with the exception of the Perdue Pegboard test involving picking-up pins which was at the 3rd percentile. Clearly the FCE indicates severe limitations involving the use of either hand." Mr. Jackson goes on to opine that "her pre-disability occupation is not a vocational option at this time... Clearly Ms. Hardt will require a position involving little to no use of the upper extremities. A current opening that fits this profile has not yet been identified in her local labor market." In addition to Mr. Jackson's report, Dr. Snider indicated in an Impairment Questionnaire dated January 14, 2005, specifically that Ms. Hardt has frequent interference with attention and concentration, that her impairments have persisted continuously at least from January 22, 2003, and that Ms. Hardt would have difficulty working at a regular job on a sustained basis, including limitations on her ability to walk, sit or stand due to her impairments. Reliance failed to follow written procedures "When a TSA may not be appropriate" which states a TSA may not be appropriate "When medical information indicates less than full-time work capacity, ... or no work capacity. When new medical information indicates a decrease in functionality". Clearly there is continuing medical evidence in the file that Ms. Hardt's

conditions were not improving and, in fact, were deteriorating;

(d) failed to consider medical records about Ms. Hardt's overall neuropathy, despite such request on July 14, 2004 from Robert Jackson, LMFT, an independent rehabilitation counselor hired and paid for by Reliance to perform a vocational assessment on Ms. Hardt to contact Dr. Snider and ask him to comment on the October 13, 2003 FCE;

(e) performed an erroneous Vocational Review based on the job description of an Executive Secretary which was not comparable to the job of Executive Assistant to the President, which Ms. Hardt was performing;

(f) failed to contact Ms. Hardt's treating physician to discuss her medical condition, despite such request on July 14, 2004 from Robert Jackson, LMFT, an independent rehabilitation counselor hired and paid for by Reliance to perform a vocational assessment on Ms. Hardt to contact Dr. Snider and ask him to comment on the October 13, 2003 FCE;

(g) completely disregarded the limitations and restrictions placed on Ms. Hardt by her treating physicians;

(h) failed to perform an independent medical analysis of Ms. Hardt's medical condition based on her overall hereditary small-fiber neuropathy;

(i) failed to perform a proper peer review;

(j) improperly relied on the FCE of October 13, 2003, which did not evaluate the functionality of the total person and measured only hand dexterity, and

(k) improperly identified positions for employment that Ms. Hardt was physically and mentally incapable of performing.

42. Ms. Hardt timely appealed the denial of benefits decision to Reliance. See appeal attached hereto as Exhibit L.

43. Reliance had forty-five (45) days from the date they received Ms. Hardt's appeal letter of September 14, 2005 to respond, approximately due October 3, 2005. Reliance requested an extension of forty-five (45) additional days by letter dated December 5, 2005, a total of eighty-four (84) days from the original letter of appeal. They responded with their final determination on March 27, 2006, a total of one hundred thirteen (113) days later. During the period following the extension is when Reliance obtained on the Vocational Review.

44. Reliance failed to respond to the appeal in the time period required by the Plan. Therefore, Ms. Hardt is entitled to a *de novo* review.

45. Ms. Hardt is entitled to benefits under the Plan.

46. Reliance has a dual role in administering the Plan and insuring the Plan which creates a conflict of interest.

47. A true and accurate copy of the claims file relied upon by the defendants in denying benefits is attached hereto as Exhibit M (redacted per local Rule 7).

COUNT I: FAILURE OF DEFENDANT RELIANCE TO PAY BENEFITS UNDER THE TERMS OF THE PLAN

48. Plaintiff realleges, adopts, and incorporates herein by reference paragraph 1 through 47 of the allegations set forth herein.

49. Defendant Reliance currently exercises control over the Plan.

50. Defendant Dan River is the current Plan Administrator of the Plan, and serves as the claims review fiduciary. Reliance has a conflict of interest because they are the claims review fiduciary and the Plan interpreter with respect to Plaintiff's claim and fund the plan.

51. As of this date, Reliance has failed to provide Ms. Hardt continuing long term total disability benefits under the terms of the Plan.

52. As a direct and proximate cause of Defendant Reliance's failure to provide Ms. Hardt continuing long term disability benefits under the terms of the Plan, Ms. Hardt has been damaged in the amount of $32,580.00 (20 months from July 24, 2005 through March 23, 2007 at $1629.00/mo) plus interest through March 23, 2007. Ms. Hardt is entitled to receive benefits through age 66, an additional 46 months

COUNT II: FAILURE OF DEFENDANT DAN RIVER GROUP LONG-TERM DISABILITY PLAN TO PAY BENEFITS UNDER THE TERMS OF THE PLAN

53. Plaintiff realleges, adopts, and incorporates herein by reference paragraph 1 through 52 of the allegations set forth herein.

54. To date, Defendant Dan River Inc. Group Long-Term Disability Plan has failed to provide Ms. Hardt continuing long term disability benefits under the terms of the Plan.

55. As a direct and proximate cause of Defendant Dan River Inc. Group Long-Term Disability Plan's failure to provide Ms. Hardt continuing long term disability benefits under the terms of the Plan, Ms. Hardt has been damaged in the amount of $32,580.00 (20 months from July 24, 2005 through March 23, 2007 at $1629.00/mo) plus interest through March 23, 2007. Ms. Hardt is entitled to receive benefits through age 66, an additional 46 months.

COUNT III: DECLARATORY JUDGMENT

56. Plaintiff realleges, adopts, and incorporates herein by reference paragraph 1 through 55 of the allegations set forth herein.

57. An actual controversy exists between Ms. Hardt and Defendant Reliance and Defendant Dan River Inc. Group Long-Term Disability Plan with respect to whether Ms. Hardt is entitled to continuing long term disability benefits under the Plan.

58. Ms. Hardt has asserted to all Defendants that she is entitled to continuing long-term disability benefits under the Plan.

59. Defendants have declined to honor Ms. Hardt's rights under the Plan, maintain that Ms. Hardt is not entitled to such continuing benefits under the Plan, and have disclosed an intention to not grant Ms. Hardt this benefit in the future.

60. As a direct and proximate result of Defendants refusal to pay Ms. Hardt this benefit, Ms. Hardt will lose future benefits as set forth in the Plan and accompanying plan documents, in the amount of $74,934 from March 24, 2007 to, but not including, the date upon which Ms. Hardt turns 66 in 2011.

WHEREFORE, with respect to Count I of this Complaint, Plaintiff prays that:

A. This Court grant Ms. Hardt $32,580.00 plus interest in past benefits due to her under the Plan through March 23, 2007;

B. This Court order Defendant Reliance Standard Life Insurance to pay Plaintiff the costs of this action, together with reasonable attorney fees, pursuant to 29 U.S.C. § 1132(g); and that

C. This Court provide such other relief as it may deem necessary to secure Plaintiff's rights.

WHEREFORE, with respect to Count II of this Complaint, Plaintiff prays that:

A. This Court grant Ms. Hardt $32,580.00 plus interest in past benefits due to her under the Plan through March 23, 2007;

B. This Court order Defendant Dan River Inc. Group Long-Term Disability Plan to pay Plaintiff the costs of this action, together with reasonable attorney fees, pursuant to 29 U.S.C. § 1132(g); and that

C. This Court provide such other relief as it may deem necessary to secure Plaintiff's rights.

WHEREFORE, with respect to Count III of this Complaint, Plaintiff prays that:

A. This Court decree and declare that Ms. Hardt has a right to continuing long term disability benefits under the Plan that results in future benefits owed to Plaintiff in the amount of

$74,934.00 from March 24, 2007 to, but not including, the date Ms. Hardt turns 66 in 2011.

B. This Court grant Plaintiff the costs of this action, together with reasonable attorneys fees, pursuant to 29 U.S.C. § 1132(g); and that

C. This Court provide such other relief as the Court may deem necessary and proper to secure Plaintiff's rights.

BRIDGET HARDT
By/s/ Ann K. Sullivan

Ann K. Sullivan
VSB #17762
CRENSHAW, WARE & MARTIN, P.L.C.
1200 Bank of America Center
Norfolk, VA 23510
(757) 623-3000
Facsimile (757) 623-5735

[ENTERED: APRIL 24, 2008]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

BRIDGET HARDT,

Plaintiff,

v. **Civil Action No. 2:07cv105**

RELIANCE STANDARD LIFE INSURANCE CO., et al.,

Defendants.

ORDER

This matter is before the Court on Reliance Standard Life Insurance Co.'s ("Reliance") Motion for Reconsideration of the thirty-day (30) deadline set by the Court to act on Bridget Hardt's disability application. Reliance seeks to obtain sixty (60) additional days, that is, until June 29, 2008, to render a decision.

The Court conducted a telephonic hearing regarding Reliance's Motion on April 18, 2008. Ann Sullivan, Esquire, appeared on behalf of Ms. Hardt. Joshua Long, Esquire, appeared on behalf of Reliance. The Official Court Reporter was Penny C. Wile. For the reasons stated on the record, Reliance's Motion is **GRANTED IN PART**. The

Court will extend the time to act on Ms. Hardt's application until May 31, 2008.

The Clerk is **DIRECTED** to send a copy of this Order to all counsel of record.

IT IS SO ORDERED.

/s/ Walter D. Kelley, Jr.
Walter D. Kelley, Jr.
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
April 23, 2008

[ENTERED: JUNE 10, 2008]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

BRIDGET HARDT,

Plaintiff,

v. **Civil Action No. 2:07cv105**

RELIANCE STANDARD LIFE INSURANCE CO.,

and

DAN RIVER GROUP LONG-TERM DISABILITY PLAN,

Defendants.

ORDER

The above-captioned case was recently transferred to the docket of the undersigned, and, upon review of the file, the court notes that, on March 31, 2008, the matter was remanded to defendant Reliance Standard Life Insurance Co. ("Reliance") for reconsideration of the plaintiff's claim for long-term disability benefits. Subsequent to that order, on April 24, 2008, the court extended the deadline in which Reliance was to act on the plaintiff's application for benefits until May 31, 2008. As noted in the court's order of March 31,

2008, were Reliance to fail to adequately consider the evidence of the plaintiff's disability before that date, judgment would be entered in favor of the plaintiff.

The May 31, 2008 deadline has passed and the court has received no word from the parties as to the status of the plaintiff's claim. Accordingly, the court **ORDERS** that the parties file a status report with the court within seven (7) days of the date of this Order, indicating the status of the plaintiff's application and whether Reliance had complied with the court's order prior to May 31, 2008. Any failure by Reliance to comply with the deadline will result in judgment being entered in favor of the plaintiff, per the March 31, 2008 order. Should the parties fail to submit a timely status report, judgment will be entered in favor of the plaintiff.

The Clerk is **REQUESTED** to send a copy of this Order to counsel of record for all parties.

It is so **ORDERED**.

/s/Jerome B. Friedman
UNITED STATES DISTRICT JUDGE

June 10, 2008
Norfolk, Virginia

[ENTERED: JUNE 12, 2008]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

BRIDGET HARDT

v. **Civil Action No.: 2:07 cv 105**

RELIANCE STANDARD LIFE INSURANCE COMPANY and DAN RIVER GROUP LONG-TERM DISABILITY PLAN

DEFENDANT RELIANCE STANDARD'S STATUS REPORT

In response to the Court's Order dated June 10, 2008, Defendant Reliance Standard Life Insurance Company ("Reliance Standard"), by counsel, submits this status report confirming its compliance with the Court's Order dated April 24, 2008.

On remand, Reliance Standard acted within the specified time frame and found Ms. Hardt eligible for benefits. It is Reliance Standard's position that this case should be dismissed with prejudice. Ms. Hardt has advised Reliance Standard that she intends to file a motion for attorneys fees. In the event Ms. Hardt pursues such a motion, Reliance Standard will oppose it.

RELIANCE STANDARD LIFE INSURANCE COMPANY and DAN RIVER GROUP LONG- TERM DISABILITY PLAN

By /s/ Joshua F. P. Long

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Fax (540)983-7711
Counsel for Defendant
Reliance Standard Life Insurance Company

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent by mail and e-mail to Ann K. Sullivan. Crenshaw, Ware & Martin, P.L.C., 1200 Bank of America Center, Norfolk, Virginia 23510, counsel for Plaintiff, this 11th day of June, 2008.

/s/ Joshua F. P. Long

[ENTERED: JUNE 13, 2008]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

BRIDGET HARDT,

Plaintiff,

vs. **Civil No. 2:07cv105**

RELIANCE STANDARD LIFE INSURANCE COMPANY,
and
DAN RIVER GROUP LONG-TERM DISABILITY PLAN

Defendants.

PLAINTIFF'S MEMORANDUM IN COMPLIANCE WITH ORDER OF JUNE 10, 2008

COMES NOW Plaintiff Bridget Hardt ("Ms. Hardt"), by counsel, and files this Memorandum in Compliance with Order of June 10, 2008 regarding the status of Plaintiff's application for benefits, and states as follows:

1. On March 31, 2008, the Court rendered an Opinion and Order remanding this case to the Plan Administrator and instructing the Plan Administrator to "act on Ms. Hardt's application by adequately considering all of the evidence discussed

within [the] Opinion within thirty (30) days of its date of issuance." At the request of Defendant Reliance Standard Life Insurance Company ("Reliance"), the Court extended this deadline to May 31, 2008 pursuant to an Order of April 24, 2008.

2. On May 20, 2008, Reliance notified the Plaintiff by letter that it had determined that its original decision should be reversed and her benefits would be reinstated. *See* Exhibit A. On May 30, 2008, Plaintiff received a letter from Reliance providing for future benefits and containing payment in the amount of $55,250.00 for disability benefits which were not paid by Reliance during the period of April 23, 2005 through May 23, 2008. *See* Exhibit B.

3. Ms. Hardt has prevailed under ERISA in obtaining a reversal of Reliance's prior decision to deny her disability benefits. Ms. Hardt requests that the Court enter judgment on her behalf based upon the Opinion and Order of March 31, 2008 declaring that Reliance failed to conduct a full and fair review prior to Judge Kelley's order to do so. Accordingly, Ms. Hardt is entitled to attorney's fees under ERISA as the prevailing party and will file the appropriate motion for attorney's fees and costs.

WHEREFORE, Plaintiff requests that the Court retain jurisdiction of this matter to permit Plaintiff to file a motion for attorney's fees and costs.

BRIDGET HARDT
By /s/ Elaine K. Inman
Of Counsel

Ann K. Sullivan, Esquire (VSB #17762)
Elaine K. Inman, Esquire (VSB #48409)
CRENSHAW, WARE & MARTIN, P.L.C.
1200 Bank of America Center
Norfolk, VA 23510
Office: (757) 623-3000
Facsimile (757) 623-5735
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June, 2008, a true and accurate copy of the foregoing Memorandum in Compliance with Order of June 10, 2008 was sent via email to the following counsel of record:

Joshua F. P. Long, Esq.
Woods Rogers PLC
Wachovia Tower, Suite 1400
10 South Jefferson Street
P O Box 14125
Roanoke, VA 24038-4125
Fax: 540-983-7711

/s/ Elaine K. Inman
Of Counsel

EXHIBIT A

RELIANCE STANDARD
Life Insurance Company

Disability Claims Department
P.O. Box 8330
Philadelphia, PA 19101-8330
(267) 256-3500
(800) 351-7500

May 20, 2008

Law Offices of Crenshaw, Ware, & Martin
Attention: Ann K. Sullivan
1200 Bank of America Center
One Commercial Place
Norfolk, VA 23510

SENT VIA FAX & REGULAR MAIL

Re: Claimant:	Bridget Hardt
Policy No:	LSC 106257
Claim No:	2003-223-010
Policyholder:	Dan River, Inc.

Dear Ms. Sullivan:

We are writing to you regarding the appeal of our decision to terminate Ms. Hardt's claim for Long Term Disability ("LTD") benefits. We have conducted an independent review of your client's claim file determined that our original decision should be reversed and her benefits reinstated at this time.

Ms. Hardt's file has been referred back to Alberta Hendricks our Long Term Disability Claims Department who will be processing the re-opening of your client's claim. Ms. Hardt should receive a check and correspondence from Ms. Hendricks in the very near future.

Please be advised that this decision should not be construed as a guarantee of future benefits. Your client may be required to provide Reliance Standard Life Insurance Company ("RSL") with periodic proof of her continuing *"Total Disability"* in order to receive future benefits in accordance with the terms of the group Policy. RSL reserves the right to enforce any and all provisions of the Policy in the future, including those provisions which might lead to the future termination of benefits.

Should you have any questions please contact our Customer Service Department at 1-800-351-7500, extension 3749.

Sincerely,

/s/ Laura M. Quinn
Laura M. Quinn
Senior Benefits Analyst
Quality Review Unit

EXHIBIT B

RELIANCE STANDARD
Life Insurance Company

Disability Claims Department
P.O. Box 8330
Philadelphia, PA 19101-8330
(267) 256-3500
(800) 351-7500

May 30, 2008

Ann K. Sullivan
Attorney at Law
Crenshaw, Ware & Martin
1200 Bank of America Center
One Commercial Place
Norfolk, VA 23501

Re : Bridget Hardt
Claim No. 2003 223 010

Dear Ms. Sullivan:

We are enclosing Ms. Hardt's Long Term disability check in the amount of $55,250.00 which represents the period 8/23/2005 to 5/23/08 34 months at $1,625.00 = $55,250.00

Ms. Hardt can expect future benefits on or about the 23rd day of each month provided that she remain Totally Disabled as defined by the group policy. The benefit was calculated in the following manner:

LTD benefit	$3,120.00
Less Social Security	$1,495.00
Monthly Benefit	$1,625.00

Should you have any questions, please contact us at 1 800 351 7500 extension 3714.

Sincerely,

/s/ Alberta R Hendricks
Alberta R Hendricks, Examiner
LTD Claims Department

PETITIONER'S BRIEF

No. 09-448

Supreme Court, U.S.
FILED
FEB 26 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

BRIDGET HARDT,

Petitioner,

v.

RELIANCE STANDARD
LIFE INSURANCE COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

TCMP
SEFKIB

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February 25, 2010

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2000 A 167

QUESTIONS PRESENTED

Section 502(g)(1) of the Employee Retirement Income Security Act of 1974 (ERISA) provides that "the court in its discretion may allow a reasonable attorney's fee and costs of the action to either party." 29 U.S.C. § 1132(g)(1).

In vacating the district court's fee award to petitioner Hardt, the Fourth Circuit held that "only a prevailing party is entitled to consideration for attorneys' fees in an ERISA action" and Hardt did not meet the "prevailing party" standard from *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598 (2002), even though the district court found "compelling evidence that [petitioner] is totally disabled," ruled Hardt "did not get the kind of review to which she was entitled under applicable law" and instructed respondent to reassess Hardt's claim "by adequately considering all the evidence discussed within this Opinion within thirty (30) days" or "judgment will be issued in favor of Ms. Hardt," and Hardt obtained the requested long-term disability benefits upon remand.

The questions presented are:

1. Whether ERISA § 502(g)(1) restricts a district court's discretion to award reasonable attorney's fees only to a "prevailing party."

2. Whether a party is entitled to attorney's fees pursuant to § 502(g)(1) when she persuades a district court that a violation of ERISA has occurred, successfully secures a judicially-ordered remand requiring a redetermination of entitlement to benefits and subsequently receives the benefits sought on remand.

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DECISIONS BELOW

The district court's order remanding the case and requiring respondent to act as instructed "within thirty (30) days" or "judgment will be issued in favor of Ms. Hardt" is reported at 540 F. Supp. 2d 656 (E.D. Va. 2008) and reproduced in the Appendix to the Petition for Certiorari (Pet. App. 31a-49a). The district court's order awarding Hardt attorney's fees and costs and entering judgment in her favor is unreported (Pet. App. 12a-30a). The opinion of the court of appeals (Pet. App. 1a-11a) is unpublished, but may be found at 336 Fed. Appx. 332 (4th Cir. 2009).

JURISDICTION

The court of appeals issued its opinion and entered judgment on July 14, 2009. It denied rehearing and rehearing en banc by order entered August 10, 2009. This Court granted the timely filed Petition for Certiorari on January 15, 2010. This Court's jurisdiction rests upon 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 502(g) of ERISA (29 U.S.C. § 1132(g)) is reproduced in the Appendix in full. The specific section at issue, Section 502(g)(1), provides:

> In any action under this subchapter (other than an action described in paragraph 2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of the action to either party.

29 U.S.C. § 1132(g)(1).

STATEMENT OF THE CASE

1. ERISA and Its Fee-Shifting Provision.

In 1974, after years of study, Congress enacted ERISA "to protect . . . participants in employee benefit plans and their beneficiaries" by establishing substantive regulatory requirements for such plans and "providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b). Congress determined "that the continued well-being and security of millions of employees and their dependents are directly affected by" employee benefit plans. 29 U.S.C. § 1001(a). The employee benefit plans regulated by ERISA include employee welfare benefit plans which, like the long-term disability (LTD) plan at issue in this case, provide "benefits in the event of . . . disability . . ." 29 U.S.C. § 1002(1).

To further ERISA's express goal to provide "appropriate remedies, sanctions, and ready access to the Federal courts," Congress allowed for attorney's fees to encourage participants and others to bring suit when warranted:

> "In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of the action to either party."

ERISA, § 502(g) (codified at 29 U.S.C. § 1132(g)(1)); *see also Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) (citing § 502(g)(1) and noting its purpose: "in answer to a possible concern that attorney's fees might present a barrier to maintenance of suits for small claims, thereby

risking underenforcement of beneficiaries' statutory rights, it should be noted that ERISA authorizes the award of attorney's fees"). This Court has acknowledged that attorney's fees and costs under § 502(g) may be awarded to either party. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 53 (1987) ("In an action under these civil enforcement provisions, the court in its discretion may allow an award of attorney's fees to either party. § 502(g)."). The first question presented here is whether Section 502(g)(1) limits a court's discretion to award attorney's fees only to a "prevailing party" where that term of art is conspicuously absent from the fee provision.

2. Hardt's Disability and Claim for Benefits.

Petitioner Hardt began to experience symptoms of carpal tunnel syndrome in 2000 when she was working as an executive assistant to the president of Dan River. Pet. App. 32a. Despite surgeries on both wrists, Hardt still experienced pain, and she stopped working in January 2003. *Id.*

In August 2003, Hardt requested LTD benefits under a Group Long-Term Disability Insurance Program Plan (the plan) sponsored by Dan River. *Id.* at 31a-32a. Respondent Reliance Standard Life Insurance Company (Reliance) had the dual, conflicting roles of both determining whether a claimant was entitled to benefits and paying the benefits as the underwriter of the plan. *Id.* at 32a.

Reliance provisionally approved Hardt's claim for LTD benefits, but then terminated the benefits in December 2003. *Id.* at 32a-33a. Hardt filed an administrative appeal, and Reliance partially reversed its decision by agreeing to provide Hardt

LTD benefits for twenty-four months based on her inability to perform the duties of her current position. *Id.* at 33a. (The plan provides LTD benefits for 24 months for workers like Hardt if a claimant "cannot perform the material duties of his/her regular occupation;" to continue receiving benefits thereafter, she must be unable to perform "the material duties of any occupation," as that term is defined. *See* Joint Appendix (JA) 37a-38a.)

Meanwhile, Hardt's health worsened. In addition to pain in her neck, shoulders, arms and hands, she developed tingling and numbness starting in her feet and extending to her knees. Fourth Circuit Joint Appendix (CTA4 JA) at 548-50. Ultimately, a neurologist diagnosed Hardt as also suffering from small fiber neuropathy, a degenerative nerve condition, and reported that Hardt's motor skills were limited by pain. Pet. App. 33a; CTA4 JA at 523-26 and 545-46. Hardt's chronic condition required her to take as many as fourteen medications. *See, e.g.*, CTA4 JA at 525. Despite increases in prescribed pain medication, Hardt "continued to have obvious pain," which became worse over the following months. Pet. App. at 34a-35a. She also had difficulty walking. *Id.*

Hardt then applied to the Social Security Administration (SSA) for disability benefits under the Social Security Act. *Id.* at 35a. In February 2005, based on questionnaires submitted by Hardt's treating physicians certifying that Hardt was unable to work, the SSA awarded Hardt disability benefits under the Social Security Act. *See id.* 35a-36a; JA 98a. The SSA found Hardt "has a combination of impairments that makes it impossible for her to

return to her former employment or make an adjustment to perform other work." *See* Pet. App. 35a-36a; CTA4 JA at 162-65; JA 98a.

Despite the SSA's disability finding, Reliance informed Hardt a few months later, in April 2005, that her LTD disability benefits would cease. CTA4 JA at 166-69; JA 98a. In that same letter, Reliance demanded that Hardt pay Reliance $14,913.23 as an offset from prior LTD benefits because she had secured social security disability benefits and the Reliance policy contains a provision coordinating benefits with Social Security payments. CTA4 JA at 168. Hardt paid this amount to Reliance from her social security benefits. JA 98a-99a (Complaint ¶38); CTA4 JA at 161.

Hardt filed a pre-litigation appeal in accordance with 29 U.S.C. § 1133, with additional supporting materials, regarding Reliance's termination of her LTD benefits. *See* Pet. App. at 36a. After further flawed processing and review of her claim in violation of ERISA (*see id.* at 36a-38a), Reliance notified Hardt in March 2006 that it would not change its April 2005 decision to terminate her LTD benefits. *Id.* at 38a.

3. District Court Proceedings and Fee Award in Hardt's Favor.

Having exhausted her administrative appeals, Hardt filed an ERISA action in the District Court for the Eastern District of Virginia. JA at 90a-110a. In her complaint, Hardt specifically pointed to procedural errors and improper review by Reliance of her LTD claim. JA 99a-105a (Complaint ¶41). Hardt requested the continuation of her LTD benefits and

"such other relief . . . to secure her rights." JA 108a-109a.

Both parties moved for summary judgment. The district court denied Reliance's motion for summary judgment. Pet. App. 31a-49a. Applying an abuse of discretion standard, the district court ruled "it is clear that Reliance's decision to deny [] Hardt long-term disability benefits was not based on substantial evidence." *Id.* at 47a. It found Reliance did not assess the impact of Hardt's neuropathy or neuropathic pain on her ability to work. *Id.* The district court determined Reliance's peer review report was incomplete and inadequate for a number of reasons, including that it was "extremely vague and conclusory," "failed to cite any medical evidence to support [its] conclusion," "failed to address the treating physicians' contradictory medical findings," "wrongly rejected [Hardt's] evidence of pain," and "ignored the substantial amount of pain medication" involved. *Id.* at 42a-47a.

As to Hardt's motion for summary judgment, the district court found "compelling evidence that [Hardt] is totally disabled due to her neuropathy" and that "the record indicates that [she] did not get the kind of review to which she was entitled under applicable law." *Id.* at 48a. The district court identified "the deficiencies in [Reliance's] approach" and remanded the case to Reliance "to fully and adequately assess [Hardt's] claim." *Id.* The district court specifically "**INSTRUCT[ED]** Reliance to act on [Hardt's] application by adequately considering all the evidence discussed within this Opinion within thirty (30) days of its date of issuance. Otherwise,

judgment will be issued in favor of [Hardt]." *Id.* at 49a (emphasis in original).

The district court retained jurisdiction to enforce its order. In fact, the court subsequently entered another order noting that the reconsideration deadline (which the court had extended previously at Reliance's request) already had passed and requiring the parties to file a status report within seven days. JA 113a-114a (June 10, 2008 Order). The order provided that "[a]ny failure by Reliance to comply with the court's [reconsideration] deadline will result in judgment being entered in favor of [Hardt], per [prior] order." *Id.* at 114a. It concluded that "[s]hould the parties fail to submit a timely status report, judgment will be entered in favor of [Hardt]." *Id.*

In accordance with the order, Reliance submitted a status report "confirming its compliance with the Court's Order" in that it "acted within the specified time frame [on remand] and found Ms. Hardt eligible for benefits." JA 115a. Hardt likewise advised the district court that Reliance reinstated her LTD benefits on remand and paid her $55,250 in accrued past due LTD benefits. JA 117a-118a. She also requested that the court enter judgment on her behalf based upon "obtaining a reversal of Reliance's prior decision to deny her disability benefits" and the court's order "declaring that Reliance failed to conduct a full and fair review prior to [the court's] order to do so." *Id.* at 118a.

Hardt then moved the district court to award her attorney's fees and costs pursuant to ERISA Section 502(g)(1), and the district court granted Hardt's motion. Pet. App. 12a-30a. The district court followed the Fourth Circuit's unusual three-step

process for determining whether to award fees under ERISA. *See id.* 15a-18a.

First, the district court recognized that, "[a]lthough not statutorily-mandated," the Fourth Circuit nonetheless requires that a § 502(g)(1) fee applicant must be a "prevailing party" under *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598 (2002). *Id.* at 15a. The district court found that its earlier ruling on the merits and order of remand had "sanctioned a material change in the legal relationship of the parties by ordering the defendant to conduct the type of review to which the plaintiff was entitled." *Id.* at 22a. Thus, the court explained, "[i]n light of the fact that, on remand, the plaintiff received precisely the benefits she had sought, she meets the definition of a 'prevailing party' and is eligible for an award of attorneys' fees." *Id.*

Second, the district court evaluated whether attorneys' fees were justified under an established five-factor test used to guide the court's discretion in ERISA fee cases. *Id.* at 22a-25a. These factors are: (1) the degree of opposing parties' culpability or bad faith; (2) the ability of opposing parties to satisfy an award of attorney's fees, (3) whether an award of attorneys' fees against the opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorney's fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself;

and (5) the relative merits of the parties' positions. *Id.* at 16a-17a.[1]

Applying the five-factor test, the district court exercised its discretion and awarded fees and costs to Hardt. *Id.* at 25a. The district court found "the bad faith and culpability of [Reliance] in ignoring the medical evidence of [Hardt's] disability weigh in favor of an award of attorneys' fees to [Hardt]." *Id.* at 23a. The record, the court explained, was "replete with instances of [Reliance's] staunch opposition to awarding any benefits to [Hardt]." *Id.* The district court determined that "it was [Reliance's] goal from the beginning to deny [Hardt] the benefits she had claimed." *Id.* It found that Reliance "engaged in only the most cursory review of the medical evidence" and that Reliance "has opposed [Hardt's] position throughout the course of this litigation." *Id.* The district court observed that Reliance awarded Hardt the benefits she sought, but "only after having been ordered by the court to provide the kind of

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[1] The district court relied on Fourth Circuit precedent using the five-factor test, *Quesinberry v. Life Ins. Co. of N. America*, 987 F.2d 1017, 1028-29 (4th Cir. 1993) (en banc), and all other courts of appeals have used this test to determine whether to award fees. *See Eddy v. Colonial Life Ins. Co. of America*, 59 F.3d 201, 206-07 (D.C. Cir. 1995); *Gray v. New Eng. Tel. & Tel. Co.*, 792 F.2d 251, 257-258 (1st Cir. 1986) (citing cases from Second, Third, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits adopting test); *Sec. of Dept. of Labor v. King*, 775 F.2d 666, 669 (6th Cir. 1985). The Seventh Circuit has used two tests, including the five-factor test, to determine whether fee awards in ERISA actions are justified. *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574, 592-93 (7th Cir. 2000) (describing five-factor test and "substantially justified" test). The Seventh Circuit does not consider the two tests to be meaningfully different. *See id.*

meaningful review of the evidence to which [Hardt] was entitled by law." *Id.* The district court further found that Reliance could pay an award of attorneys' fees and that an award of fees in this case "would deter similarly-situated defendants from failing to consider the full breadth of medical evidence available to them when reviewing a claim for benefits." *Id.* at 23a-24a. The district court determined that Hardt's "position clearly has the higher relative merit, as demonstrated in the court's remand order and–more importantly–the ultimate resolution of the case." *Id.* at 24a-25a (noting, in addition, that the court had previously held that "Reliance's decision to deny [] Hardt long-term disability benefits was not based on substantial evidence").

Finally, the district court examined the reasonableness of Hardt's request for $59,920.73 in fees and costs using a lodestar calculation. The district court reduced the requested amount and issued judgment in Hardt's favor for $39,149. *Id.* at 29a-30a.

4. The Fourth Circuit's Ruling.

Reliance appealed to the Fourth Circuit, raising a single question: "Is Ms. Hardt a 'prevailing party?'" Fourth Circuit Case No. 08-1896, Appeal Docket 15, (Brief of Appellant, at 11). *See also id.* at Appeal Docket 21 (Reply Brief of Appellant at 1) ("The single question before this Court is whether Ms. Hardt can be considered a 'prevailing party' as required under the ERISA fee-shifting statute when there is no judgment on the merits in her favor and there is no consent decree."). Reliance chose not to appeal the district court's summary judgment findings and

remand order, the use of the five-factor test, the findings made by the district court under that test, or the amount of fees and costs awarded.

The Fourth Circuit vacated the district court's award of attorneys' fees. Pet. App. 1a-11a. The Fourth Circuit first explained the prerequisite it imposes before a court may exercise discretion under the five-factor test to determine whether to award fees in ERISA cases: that a beneficiary first must establish "prevailing party" status under *Buckhannon* because "only a prevailing party is entitled to consideration for attorneys' fees in an ERISA action." *Id.* at 7a-8a (citing *Martin v. Blue Cross & Blue Shield of Va., Inc.*, 115 F.3d 1201, 1210 (4th Cir. 1997)). The court further explicated its view that "only enforceable judgments on the merits and court-ordered consent decrees" satisfy the *Buckhannon* "prevailing party" standard. *Id.* at 8a.

The Fourth Circuit next examined whether Hardt met its *Buckhannon* prevailing-party standard. The Fourth Circuit reviewed its decision in *Goldstein v. Moatz*, 445 F.3d 747, 751 (4th Cir. 2006), in which the court "clarified [the] *Buckhannon* standard by holding that there is no exception for 'tactical mooting' – the situation where a defendant chooses to settle rather than risk an award of attorney's fees." *Id.* at 8a. The court noted that *Goldstein* "left open the question of whether there is an exception to the *Buckhannon* rule where a defendant has agreed to provide the relief requested in response to an affirmative indication by the presiding court that the plaintiff is about to prevail." *Id.* at 8a-9a (internal punctuation omitted).

The Fourth Circuit ultimately concluded that Hardt's case involved "tactical mooting" and that she therefore did not meet the court's prevailing party test. As the Fourth Circuit saw it, the district court's findings that Hardt is totally disabled and that she did not get the kind of review to which she was entitled under applicable law, coupled with its order remanding for Reliance to re-determine whether Hardt qualified for benefits under threat of judgment being entered in Hardt's favor, were "simply insufficient to overcome the statutory requirement that a party applying for a fees and costs award must first have been accorded some relief in the district court." *Id.* at 10a (quoting *Goldstein*, 445 F.3d at 752). The Fourth Circuit held that because the district court remand "did not require Reliance to award benefits" the order does not "constitute an 'enforceable judgment[] on the merits' as *Buckhannon* requires. 532 U.S. at 604," *id.*, thus reversing the award of fees and costs.

SUMMARY OF ARGUMENT

I. The Fourth Circuit's decision rests on the faulty premise that ERISA Section 502(g)(1) is a "prevailing party" statute governed by *Buckhannon*. It is not. Section 502(g)(1) does not use the term "prevailing party" (or even "prevail"), but expressly authorizes an award of fees and costs "in [the court's] discretion . . . to either party." *Buckhannon* recognized that "prevailing party" is "a legal term of art," 532 U.S. at 603, with its own set of rules regarding when fees may be authorized. As the Court recognized in *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), the absence of the "prevailing party" language means Congress "intended to eliminate" the restrictive

interpretation of "prevailing party" used in other fee-shifting provisions prevalent at the time of its enactment. *See id.* at 687 (interpreting Clean Act Act's language allowing fee-shifting "to any party . . . where appropriate" and discussing use of the term "prevailing party" in the 1970's when ERISA was being considered and ultimately enacted). Congress chose not to include the "prevailing party" legal term of art in Section 502(g)(1), and that choice must be given effect.

Moreover, when Congress amended ERISA in 1980, it reaffirmed the original language of Section 502(g) and created a new fee-shifting provision, Section 502(g)(2), that mandates fees when "judgment" is entered in favor of the plan in cases seeking delinquent contributions to multiemployer employee benefit plans. Congress retained in full the original, broad discretionary fee-shifting language of Section 502(g)(1); it simply added a parenthetical to that section to provide the exception for multiemployer plan cases. The addition of the word "judgment" in Section 502(g)(2) indicates that its statutory sibling, Section 502(g)(1), does not require an "enforceable judgment on the merits," contrary to the Fourth Circuit's holding below. Pet. App. 10a. (brackets omitted).

The decision by Congress not to include a "prevailing party" requirement is fully consistent with its intent that concepts of trust law directly inform regulation and enforcement under ERISA. It was settled law at the time of ERISA's enactment that courts in trust cases generally could award fees to either party, paid by the opposing party. The five-factor test used by lower courts to guide their

discretion whether to award fees is analogous to principles considered under trust law in the same circumstances. The five-factor balancing test appropriately considers the relative merits of the parties' positions, among other factors, before allowing fees to issue. The majority of those factors address the merits of the case, but appropriately without the limiting "prevailing party" requirement.

This Court has acknowledged the carefully-crafted and reticulated enforcement scheme established by Congress in ERISA. *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) (stating the Court is "reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA"). "The civil enforcement scheme of [Section 502] is one of the essential tools for accomplishing the stated purposes of ERISA." *Dedeaux*, 481 U.S. at 52. This Court repeatedly has concluded, without exception, that the precise language of Section 502 must be followed. The Fourth Circuit's imposition of *Buckhannon*'s "prevailing party" test conflicts with the clear text of the statute authorizing courts "in their discretion" to award fees and impermissibly adds a prerequisite for consideration of fees that Congress did not include.

In exercising the discretion provided by Section 502(g)(1), courts should apply the universally-accepted five-factor test without demanding a party meet the "prevailing party" standard from *Buckhannon*. Here, the district court exercised its discretion and held Hardt eligible for fees under that well-established five-factor test. Reliance did not contest on appeal the district court's use of or factual findings under that test (or, indeed, raise such issues in its brief in

opposition in this Court, *see* S. Ct. Rule 15.2). The Court therefore should reverse the Fourth Circuit's judgment and remand with instructions that the Fourth Circuit remand to the district court to enter the original judgment and to determine additional fees and costs in light of the appeals.

II. Even if there is a prerequisite to the five-factor test, the district court's decision to award Hardt fees was correct and not an abuse of discretion. The Fourth Circuit's judgment vacating the district court's award of fees constitutes error.

First, Hardt meets the standard approved in *Ruckelshaus*. Hardt obtained substantial relief directly as a result of her lawsuit. The district court found that Reliance violated ERISA in handling Hardt's claim for LTD benefits and in deciding to terminate her LTD benefits. The district court remanded the matter to Reliance to re-assess whether Reliance should have terminated Hardt's benefits. The district court stated it would enter judgment for Hardt if Reliance did not act as directed. Reliance advised the district court that it complied with the court's order, and Hardt received the LTD benefits after the court-ordered remand. She therefore is eligible for attorney's fees.

Second, Hardt meets *Buckhannon*'s prevailing party standard. The district court's orders significantly altered the legal relationship of the parties, and thus constitute the "judicial imprimatur" to satisfy *Buckhannon* and other "prevailing party" precedent. The Fourth Circuit's holding that *Buckhannon* is satisfied only by a judicially-approved consent decree or an enforceable judgment on the merits is not supported by *Buckhannon*'s language

and impermissibly overrules this Court's precedents that a judicially-ordered remand in analogous circumstances satisfies the "prevailing party" test. And, in any event, the district court's remand order constitutes judicially-ordered relief to Hardt for the ERISA violations. It effectively granted Hardt partial summary judgment on her claim that Reliance violated ERISA in its handling and review of her request for LTD benefits and abused its discretion in terminating those benefits. The orders were enforceable, and Reliance acknowledged complying with them in its filings in the district court. Hardt therefore was eligible for fees even under *Buckhannon*.

ARGUMENT

I. ERISA Section 502(g)(1) Authorizes Courts to Use Their Discretion to Determine Whether to Award Fees and Does Not Limit Fees Only to a "Prevailing Party."

Section 502(g)(1) allows a court to award fees and costs "in its discretion . . . to either party." This plain language, as well as the structure of the statute after the 1980 ERISA Amendments (which reaffirmed Section 502(g)(1)'s discretionary language and added an exception under Section 502(g)(2)), and the object and policy of ERISA, demonstrate that Section 502(g)(1) is not a *Buckhannon* "prevailing party" statute as the Fourth Circuit held. *See Gibbs v. Gibbs*, 210 F.3d 491, 501-02 (5th Cir. 2000) (holding "a party need not prevail in order to be eligible for an award of attorneys' fees under [Section 502(g)(1)] of ERISA"); *see also Gaeth v. Hartford Life Ins. Co.*, 538 F.3d 524, 534 (6th Cir. 2008) ("the express language of 29 U.S.C. § 1132 does not limit an award of attorney

fees to the prevailing party"); *Miller v. United Welfare Fund*, 72 F.3d 1066, 1074 (2d Cir. 1995) ("Section 502(g)(1) contains no requirement that the party awarded attorney's fees be the prevailing party"); *Freeman v. Continental Ins. Co.*, 996 F.2d 1116, 1119 (11th Cir. 1993) (stating that "[u]nlike other fee-shifting provisions, which give the court discretion to award fees to a prevailing party, [Section 502(g)(1)] allows a court to award fees to either party.").

A. "Prevailing Party" Is a Well-Established Legal Term of Art, and Its Absence in a Fee-Shifting Statute Has Clear Meaning.

This Court has ruled that the term "prevailing party" is a "legal term of art," circumscribing the instances in which courts may award fees or costs. *Buckhannon*, 532 U.S. at 603; *see id.* at 610 (Scalia, J., concurring) ("'Prevailing party' is not some newfangled legal term invented for use in late-20th-century fee-shifting statutes."). In *Buckhannon*, the Court considered a case in which the plaintiff sued defendant for declaratory and injunctive relief, but, prior to any judicial action on the merits, the state legislature mooted the case by changing the offending statutory provision. *Id.* at 600-01. The Court surveyed its prior precedents involving "prevailing party" fee-shifting statutes and observed that it had never approved an award of attorney's fees without some degree of formal success. It thus concluded:

> A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change. Our precedents thus counsel against holding that the term

> "prevailing party" authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties.

Id. at 605 (emphasis in original). When Congress uses such "clear legislative language" as "prevailing party" in a fee-shifting provision, that legal term of art thus has "clear meaning." *See id.* at 610.

Where Congress does *not* incorporate the "prevailing party" term of art in a fee-shifting statute, this Court has determined that Congress thereby rejects application of the "prevailing party" standard to that provision. *See Ruckelshaus*, 463 U.S. at 687. In *Ruckelshaus*, the Court considered whether a lower court had properly awarded fees under the Clean Air Act to two plaintiffs whose legal claims were rejected completely. *See id.* at 682-83. Although reversing the lower court's fee award, the Court recognized a clear distinction between "prevailing party" fee provisions and the language of the Clean Air Act that "the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate." By using the language "whenever . . . appropriate," "Congress intended to eliminate . . . the restrictive readings of 'prevailing party' adopted in some of the cases" at the time the Clean Air Act was enacted, *see id.* at 689, which was the same time period in which Congress considered and enacted ERISA.

When it chooses not to include the term of art "prevailing party," Congress "extend[s]" fee-shifting to situations not covered under the "prevailing party" standard. *Id.* at 686 n.8. And, outside of the

narrower "prevailing party" standard, a court order is not required for a party to achieve the degree of success necessary to trigger eligibility for a fee award (though Hardt has such an order here). *Id.* ("whenever . . . appropriate" language authorizes award of fees in "suits that force[] defendants to abandon illegal conduct" (citing S. Rep. No. 91-1196 (1970)); *see also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 67 n.6 (1987) (citing Senate report language from Clean Water Act that is identical to report cited in *Ruckelshaus*, and stating that the Clean Water Act fee-shifting provision protects plaintiffs from "the suddenly repentant defendant"). *Cf. Ohio River Valley Environmental Coalition, Inc. v. Green Valley Coal Co.*, 511 F.3d 407, 414 (4th Cir. 2007) (holding party who pursues a claim under a fee-shifting statute that does not contain "prevailing party" or "judgment" language may be eligible for fees where the party obtains, through settlement or otherwise, substantial relief prior to adjudication on the merits); *Association of California Water Agencies v. Evans*, 386 F.3d 879 (9th Cir. 2004); *Sierra Club v. EPA*, 322 F.3d 718, 719 (D.C. Cir. 2003); *Loggerhead Turtle v. County Council of Volusia County*, 307 F.3d 1318 (11th Cir. 2002).

The absence of the "prevailing party" term of art within Section 502(g)(1) means that a court, in exercising its discretion vested by Congress, should apply a more expansive standard than *Buckhannon* when determining whether to award fees. Reliance below, and in its brief in opposition to certiorari here, did not object to that standard being the well-accepted five-factor test.

B. Congress Twice Declined to Incorporate a *Buckhannon* "Prevailing Party" Standard into Section 502(g)(1).

"The starting point for [the] interpretation of a statute is always its language." *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989). Under this first and "cardinal canon" of statutory construction, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there[.]" *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992). Accordingly, when a statute is unambiguous, "this first canon is also the last: 'judicial inquiry is complete.'" *Id.* at 254 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

1. Congress Chose Not to Incorporate a "Prevailing Party" Requirement When Enacting ERISA.

Section 502(g)(1) is clear in its own right: A court may allow a reasonable attorney's fee and costs of action "in its discretion. . . to either party." 29 U.S.C. § 1132(g)(1). Nowhere in the section does the term "prevailing party" appear. Had Congress intended to restrict attorney's fees and costs only to a "prevailing party"–as the Fourth Circuit erroneously held below–it could have and would have so stated. Congress knew well how to incorporate a "prevailing party" standard into a fee-shifting statute, as amply demonstrated by the numerous occasions in which it

expressly incorporated such a requirement in other fee-shifting provisions prior to enacting ERISA.[2]

In fact, Congress considered and rejected language in precursor bills to ERISA that would have limited attorney's fees and costs to prevailing participants or beneficiaries upon entry of judgment in their favor. *See* H.R. Rep. 90-1867, at 27 (Sept. 5, 1968) (reporting language of forerunner bill H.R. 6498 as: "The court in such action may in its discretion, *in addition to any judgment awarded to the plaintiff or plaintiffs*, allow a reasonable attorney's fee to be paid *by the defendant*, and costs of the action") (emphasis added). Congress also rejected explicit urging from business and public interest groups and employee representatives to restrict a district court's discretion, either by requiring a party to be "successful in an action" before fees could be awarded or by mandating a fee award.[3]

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[2] As to "prevailing party" statutes, *see, e.g.*, 5 U.S.C.A. § 504(a)(1) (1976 ed., Supp. V); 12 U.S.C.A. § 2607(d)(5) (Real Estate Settlement Procedures Act); *see also*, Samuel R. Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. Pa. L. Rev. 281, 305 nn.109-10 (1977) (collecting fee-shifting statutes in existence around time ERISA was enacted in 1974).

[3] For example, the primary bill that became ERISA, H.R. 2, contained language in § 106(i)(1) mirroring that ultimately enacted as Section 502(g)(1). In the Congressional hearings held on that bill, business groups repeatedly requested that Congress allow reasonable attorney's fees and cost of action only to a party "successful in an action." *See, e.g.*, Statement of Stetson B. Harman, President, Trust Division, The American Bankers Association, Before the House of Representatives, General Subcommittee on Labor of the Committee on Education and Labor (Washington, D.C. February 22, 1973) (suggesting the provision "be amended to grant the court discretion to award attorney's fees and costs to defendants, if successful in an action, as well as to successful participants or

Instead, Congress declined to restrict a court's discretion and retained the broader phrase "in its discretion . . . to either party" for an award of fees and costs under Section 502(g)(1).

Thus, the legal term of art "prevailing party" is "conspicuously absent" from this ERISA fee-shifting provision. *Gibbs*, 210 F.3d at 501. As in *Ruckelshaus*, Congress did not direct that fee awards had to be pre-conditioned on a finding in accordance with that well-established term of art and all of the requirements associated with it. *Id.* at 501, 503 (holding "a party need not prevail in order to be eligible for an award of attorneys' fees under § 1132(g)(1) of ERISA" based on "conspicuous[] absen[ce]" of the word "'prevailing' which term has generally been included in the other fee-shifting statutes enacted by Congress").

2. Congress Chose Not to Incorporate a "Prevailing Party" Requirement When Amending and Reenacting the Fee-Shifting Provision at Issue.

In 1980, Congress amended ERISA specifically to create an exception within Section 502(g) to mandate an award of reasonable attorney's fees and costs to

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beneficiaries and to give the court discretion . . . to require the plaintiff to post security for payments of costs and attorney's fees."), *reprinted in*, 19-A Arnold & Porter, *Arnold & Porter Legislative History: Employee Retirement Income Security Act of 1974*, at 164 (1993) [hereinafter "__ A&P Leg. Hist. at __"].

As to proposed language mandating an award of fees to successful plaintiffs, see, *e.g.*, Statements of Ralph Nader and Karen Ferguson, Public Interest Research Group, Washington, D.C., Before the House of Representatives, General Subcommittee on Labor of the Committee on Education and Labor (Washington, D.C. February 27, 1973), *reprinted in*, 19-A A&P Leg. Hist. at 249, 270.

be paid by a defendant in certain cases, but only where judgment is entered. *See* Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, § 306(b), as codified at 29 U.S.C. § 1132(g)(2). Specifically, the 1980 Amendments added new standards for a fee award in multiemployer plan delinquent contribution cases (also known as "Section 515" cases, codified at 29 U.S.C. § 1145) that were not present in the original statute, providing in relevant part:

> In any action under this title by a fiduciary or on behalf of a plan to enforce section 515 *in which a judgment in favor of the plan is awarded*, the court shall award the plan [specified relief, including] reasonable attorney's fees and costs of the action, *to be paid by the defendant*.

29 U.S.C. § 1132(g)(2) (emphasis added). Congress renumbered original Section 502(g) as Section 502(g)(1) and added a parenthetical to it to carve out the newly created exception for Section 515 cases. *See* 94 Stat. 1295 (1980).[4]

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[4] In the same 1980 Amendments, Congress added a "prevailing party" fee-shifting provision for multiemployer plan withdrawal liability cases under a different subchapter of ERISA. *See* Pub. L. No. 96-364, § 104(2), 94 Stat. 1208, 1263 (1980), as codified at 29 U.S.C. § 1451(e) ("In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party.").

Moreover, in 1986, Congress added a fee-shifting provision to this other subchapter of ERISA for claims related to single-employer plans where a "party who prevails or substantially prevails." *See* 29 U.S.C. § 1370(e)(1).

That is, under Section 502(g)(2) of ERISA, an award of reasonable attorney's fees is available only where a fiduciary has obtained a judgment to enforce an employer's obligation to make contributions to a multiemployer plan. However, by specifically amending the original language via a parenthetical to carve out the newly inserted exception, Congress chose to retain the statutory language vesting courts with expansive discretion to award fees and costs in all other actions brought under this subchapter of ERISA: "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1).

When Congress chooses to amend a statute, it is presumed to have acted intentionally. Here, the resulting differences in language between the two related attorney's fee provisions demonstrate Congress's understanding that the original language – still present at Section 502(g)(1) – does not set forth the narrower "prevailing party" requirement. *See Gross v. FBL Fin. Servs.*, --- U.S. ---, 129 S. Ct. 2343, 2349 (2009) ("negative implications raised by disparate provisions are strongest" where the provisions were "considered simultaneously when the language raising the implication was inserted"); *see also Miller*, 72 F.3d at 1074 (noting difference in language between §§ 502(g)(1) and 502(g)(2) in concluding no prevailing party requirement exists within § 502(g)(1)).

The differences between these statutory siblings – Sections 502(g)(1) and 502(g)(2) – re-enforce the conclusion that Section 502(g)(1) is not governed by *Buckhannon*. If the original fee-shifting language required "an enforceable judgment on the merits," as

the Fourth Circuit required of Hardt, Pet. App. 10a (brackets omitted), there would have been no need for Congress specifically to require a "judgment" before fees could be awarded in the new Section 502(g)(2). *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) ("it is a general principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotations omitted).

Moreover, the legislative history of the 1980 Amendments confirms that Congress clearly understood the new requirement of "judgment in favor of the plan" under Section 502(g)(2) as meaning that the plan must "prevail."[5] Yet, Section 502(g)(1) does

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[5] Section 502(g)(2) originated in the Senate as S. 1076. *Bd. of Trs. of the Hotel & Rest. Emples. Local 25 v. JPR, Inc.*, 136 F.3d 794, 803 and n.8 (D.C. Cir. 1998) (recounting legislative history of MPPAA). The accompanying Senate Report stated:

> The public policy of this legislation to foster the preservation of the private multiemployer plan system mandates that provision be made to discourage delinquencies and simplify delinquency collection. . . . A plan sponsor that *prevails in any action to collect delinquent contributions* will be entitled to recover the delinquent contributions, court costs, attorney's fees, and double interest on the contributions owed.

Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., S. 1076: The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, at 43-44 (Comm. Print 1980) (emphasis added).

The Court has relied on this Senate committee report in interpreting the purpose of Section 502(g)(2). *Laborers Health*

not require a "judgment" before a court may award fees, as the Fourth Circuit held below. The 1980 Amendments, and the resulting language and structure of § 502(g) as a whole, show that Congress did not intend to limit Section 502(g)(1) fee awards to a narrower "prevailing party" standard.

In sum, Congress twice – once in 1974 when originally enacting ERISA and once when it amended Section 502(g)(1) and created Section 502(g)(2) – made a considered decision not to include a "prevailing party" requirement within ERISA. The Court must give effect to Section 502(g)(1) as written, without a "prevailing party" requirement. The Fourth Circuit erred in holding that Hardt was not entitled to a fee award under Section 502(g)(1) if she was not a "prevailing party" within the meaning of *Buckhannon*.

If the rejection by Congress of a prevailing party standard and its retention of more expansive authority in Section 502(g)(1) for a court to issue a fee award "in its discretion" means anything, it surely authorizes a district court to award fees under an established five-factor test that takes into account the merits of the parties' positions (including that Hardt proved a violation of ERISA, secured a remand for a re-determination of benefits and was awarded the benefits on remand), as well as the parties' bad faith or culpability.

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and Welfare Trust Fund for Northern California, et al. v. Advanced Lightweight Concrete Co., Inc., 484 U.S. 539, 546-48 (1988).

Because Reliance did not appeal the district court's use of or findings under the established five-factor balancing test, this should end the matter. Nonetheless, Hardt shows below that the district court's decision is supported by the object and policy of ERISA, as well as trust law concepts upon which Congress intended courts to rely in interpreting and enforcing ERISA.

C. Reading a "Prevailing Party" Requirement into Section 502(g)(1) Would Upset ERISA's Carefully Crafted Enforcement Scheme.

As the Court has recognized, ERISA is "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests." *See Mertens v. Hewitt Associates*, 508 U.S. 248, 262 (1993). The Court has repeatedly emphasized that ERISA is a "comprehensive and reticulated statute" with "carefully integrated civil enforcement provisions," *Russell*, 473 U.S. at 146 (quoting *Nachman Corp. v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361 (1980)).

As a result, the Court has concluded, without exception, that courts must follow the precise language of the Section 502's detailed enforcement scheme. The Court has declined to read into ERISA any implied claims or remedies. *See Russell*, 473 U.S. at 146 (declining to expand Section 502(a)(2) to encompass relief to an individual unrelated to any loss to the plan); *Mertens*, 508 U.S. at 262 (rejecting claim that ERISA allows cause of action against a nonfiduciary who knowingly participates in a fiduciary breach); *Dedeaux*, 481 U.S. 41, 56 (holding

that the civil enforcement scheme codified at § 502(a) is not to be supplemented by state-law remedies). Likewise, the Court has declined to read limiting language into Section 502 where none is stated. *See, e.g., Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 239 (2000) (declining to limit the universe of defendants who may be sued under § 502(a)(3) because there is no such limiting language there); *Varity Corporation v. Howe*, 516 U.S. 489, 507-508 (1996) (rejecting argument that § 502(a)(2) precludes an action pursuant to § 502(a)(3) for violation of "any provision of this title" based on a fiduciary breach because the language of § 502(a)(3) allows, without limitation, suits to remedy violations of ERISA).

Tinkering with the enforcement scheme of ERISA is rightfully for the other branches of government via the legislative process, in which the will of the people may resolve the "innumerable disputes between powerful competing interests." *See Mertens*, 508 U.S. at 262. The legal term of art "prevailing party" is absent from Section 502(g)(1). The Fourth Circuit's incorporation of the "prevailing party" term of art into Section 502(g)(1) is contrary to this Court's approach to ERISA and upsets the Act's carefully crafted civil enforcement provisions. Accordingly, the Court should reverse the judgment and decision below.

D. The Express Goal of ERISA's Fee Provision to Prevent Underenforcement of Beneficiaries' Rights Supports the Plain Meaning of the Statute.

In interpreting ERISA, as any statute, the Court also will "look to the provisions of the whole law, and to its object and policy." *Pilot Life*, 481 U.S. at 50 (internal quotations omitted). *See also Dada v. Mukasey*, --- U.S. ---, 128 S. Ct. 2307 (2008) ("'In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.'") (quoting *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991) (in turn quoting *Crandon v. United States*, 494 U.S. 152, 158 (1990)). That is, the "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. Postal Service*, 546 U.S. 481, 486 (2006).

Authorizing a court to award reasonable attorney's fees and costs "in its discretion. . . to either party," without additional unstated prerequisites to or limitations on the court's discretion other than those set forth in the established five-factor test, best fulfills the overarching goal of ERISA "to protect . . . participants in employee benefit plans and their beneficiaries" by "providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b). The fee-shifting provision is designed to ensure "that attorney's fees [do not] present a barrier to maintenance of suits for small claims, thereby risking underenforcement of

beneficiaries' statutory rights." *See Russell*, 473 U.S. at 147.

Reading a "prevailing party" requirement into Section 502(g)(1) when none exists in the statutory text thus not only conflicts with the twice-exercised congressional choice not to limit a court's discretion to award fees to prevailing party litigants in ERISA's enforcement scheme, but also undermines the express purpose of ERISA to protect beneficiaries' rights and provide appropriate remedies and meaningful access to federal courts. *See Chambless v. Masters, Mates & Pilots Pension Plan*, 815 F.2d 869, 872 (2d Cir. 1987) ("ERISA's attorney's fee provisions must be liberally construed to protect the statutory purpose of vindicating retirement rights, even when small amounts are involved.").

Many participants or beneficiaries who bring suit to enforce their rights under ERISA are of limited means. *See, e.g., Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 590 (9th Cir. 1984) ("when an employee participant brings suit under ERISA, whether it is against the trustees or the employer, the resources available to the pensioner are limited."); *Marquardt v. N. Am. Car Corp.*, 652 F.2d 715, 718 (7th Cir. 1981) ("Lavern Marquardt is a retired man in his sixties. He receives an actuarily reduced pension from the Company, and the record does not show that he has any significant alternative source of funds."). Indeed, most, if not all, persons seeking disability benefits by definition cannot work. *See, e.g.*, JA 37a-38a (requiring inability to work at one's own occupation or any occupation to qualify for LTD benefits). The disability benefits they seek, and for which they have

paid premiums, are intended to replace a portion of the income lost from their inability to work.

If the Court permits the Fourth Circuit's decision to stand such that only enforceable judgments and court-ordered consent decrees qualify for fee-shifting (even though Hardt meets that requirement here, as shown below), plan administrators vigorously will oppose benefits at every step of the process until they are compelled under threat of adverse judgment to provide such benefits. The Fourth Circuit's rule will lead to underenforcement of rights. That is because, under the Fourth Circuit's holding, fee shifting would not apply in such a circumstance, and the costs of securing an attorney could deprive a worker of a substantial portion of her entire award (or more). This is not merely a theoretical possibility. It occurred in this case, as Hardt's requested attorney's fees and costs were greater than the benefits granted by Reliance on remand. Compare Pet. App. 14a (seeking $58,920.73 in fees and costs), *with* JA 118a (granting Hardt $55,250 in accrued LTD benefits). The Fourth Circuit's rule encourages plan administrators and fiduciaries to engage in scorched earth "you sue, you lose" tactics, giving in only when they see the handwriting on the wall and realize they will be forced by a court to abide by the law. Under that rule, the express Congressional goals of "protect[ing] . . . participants in employee benefit plans" by "providing for appropriate remedies [and] ready access to the Federal courts" would become empty words.

E. ERISA Is Informed by the Historical Backdrop of Trust Law, Which Provided Courts Discretion to Award Fees and Costs to Either Party, Not Only to "Prevailing Parties."

This Court has determined that Congress intended that courts should look to trust law for guidance in interpreting ERISA. *See Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985); *see also Beck v. PACE Int'l Union*, 551 U.S. 96, 101 ("common law of trusts . . . serves as ERISA's backdrop"); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) ("a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans" (quoting 120 Cong. Rec. 29942 (1974) (remarks of Sen. Javits), as quoted in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24, n.26 (1983)). In creating a single federal regulatory scheme under ERISA, Congress knew it would supplant federal and state laws regulating employee benefits plans, including the body of state trust law that had long been relied upon in this arena. *See* 29 U.S.C. § 1144(a) (broad preemption provision); *see also New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656-57 (1995) (acknowledging "Congress's intent to establish the regulation of employee welfare benefit plans 'as exclusively a federal concern'") (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)). It nonetheless intended that the

development of federal common law rules to govern ERISA would be informed by trust law concepts.[6]

It is recognized that courts have the power to award fees to either party under trust law without requiring "prevailing party" status. *In re Catell's Estate*, 38 A.2d 466 (Del.Ch.Ct.1944) (beneficiaries awarded fees even though unsuccessful on action to have trustee removed); George Gleason Bogert & George Taylor Bogert, *The Law of Trusts & Trustees*, § 871, at 184-85 (rev. 2d ed. 1998) ("In suits to enforce the rights of trust beneficiaries the court exercises discretion as to the allowance of attorneys fees and costs, either from the trust or other sources."). Such a

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[6] In deliberation prior to enacting ERISA, Congress noted:

> In the absence of adequate federal standards, the participant is left to rely on the traditional equitable remedies of the common law of trusts. . .
>
> The fact that [] rules exist says little as to their efficacy in adjusting inequities that are visited upon plan participants, as evidenced by the hearings before this Committee.

H.R. Rep. No. 93-533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4639, 4643.

In regard to the enforcement powers granted by Section 502, Congress noted:

> The intent . . . is to provide the full range of . . . equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of benefits due to participants.

Id. at 4655; *see also* S. Rep. No. 127, 93d Cong., 2d Sess. 35, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4871 (same).

rule developed not only at common law, but also by statute. *See, e.g.*, Uniform Trust Code § 1004 ("In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.").[7]

As a result, although the general "American Rule" of civil litigation is that a party to a lawsuit ordinarily pays its own attorney's fees, it was widely accepted at ERISA's enactment, and is today, that trust law is an exception to the rule. *See Dardovitch v. Halzman, et al.*, 190 F.3d 125, 145-46 (3d Cir. 1999) (recognizing that "[o]ne of the more common exceptions to the American Rule is that attorney's fees are available at the discretion of the court in cases involving trusts"); *see also Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257-58 (1975) (recognizing "the historic power of equity" used in certain trust law cases as an exception to the American Rule).

It is therefore not surprising that Congress chose to vest such discretion in district courts to award

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[7] Section 1004 is based, according to the UTC comment, on a Mass. Gen. Laws Ch. 215 § 45. *See* Uniform Trust Code § 1004, 2006 Comment. A version of the Massachusetts law extends back to 1783. *See* Mass. Gen. Laws Ann. Ch. 215 § 45 (Historical and Statutory Notes). UTC Section 1004 "codifies the court's historic authority to award costs and fees, including reasonable attorney's fees, in judicial proceedings grounded in equity. . ." Uniform Trust Code § 1004, 2006 Comment. The comment notes certain circumstances where such fees should be awarded, which generally track factors considered in the five-factor test used by the lower courts in ERISA cases. *Id.*

reasonable fees and cost "to either party"–without the narrower "prevailing party" requirement–when the background trust rules used to inform ERISA provided precisely that same discretion to award fees. As a result, consistent with Section 502(g)(1)'s text vesting courts with broad discretion to award fees and costs "to either party," the Court should not imply an unwritten "prevailing party" standard into that text. *See NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) ("Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms").

F. The Five-Factor Test Is a Well-Established, Appropriate Guide for the Exercise of a Court's Discretion in Awarding Fees to Either Party Under ERISA.

Given that the five-factor test that lower courts use in exercising their discretion already weighs the relative merits of parties' positions, including the degree of success, there is no need for the Court to imply an unwritten and narrower "prevailing party" step before (or as part of) that test. *See Gibbs*, 210 F.3d at 503. In fact, because "ERISA does not use the 'prevailing party' language in its attorneys' fee provision," courts simply should apply the well-established five-factor test to guide them in determining whether to award fees at their discretion. *Gibbs*, 210 F.3d at 503; *see also Salovaara v. Eckert*, 222 F.3d 19, 27-28 (2d Cir. 2000) (holding "a court has discretion to award attorney's fees 'to either party'" pursuant to Section 502(g)(1) and that the settled five-

factor test for awarding fees is "applicable regardless of which party seeks attorney's fees").

The established five factors under ERISA are: (1) the degree of opposing parties' culpability or bad faith; (2) the ability of opposing parties to satisfy an award of attorneys' fees, (3) whether an award of attorney's fees against the opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorney's fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions. "No one of these factors is necessarily decisive, and some may not be apropos in a given case, but together they are the nuclei of concerns that a court should address in applying section 502(g)." *Iron Workers Local # 272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980); *see also Quesinberry*, 987 F.2d at 1029 (following *Iron Workers*). The absence of the distinct concepts of culpability or bad faith does not preclude a fee award, though they weigh heavily in the analysis. *See Paese v. Hartford Life Ins. Co.*, 449 F.3d 435, 450-51 (2d Cir. 2006). Indeed, at least three of the five factors are affected by the degree of success on the merits – meaning that the litigant has gained at least some of what she sought in the suit – although formal, court-ordered success or "prevailing party" status in the *Buckhannon* sense is not required. *See Miles v. New York State Teamsters Conference, Pension and Retirement Fund Employee Pension Benefit Plan*, 698 F.2d 593, 602 (2d Cir.), *cert. denied*, 464 U.S. 829 (1983). Applying these factors generally will mean that fees are limited to litigants who have achieved at least some degree of success on

their claims (in both the *Ruckelshaus* and the common meaning of "success").

These five factors closely and appropriately track the trust law concepts that inform ERISA's enforcement scheme. *See* Bogert et al., *The Law of Trusts and Trustees* § 871, at 187-94 (listing factors courts considered under trust law, which generally mimic the five-factor test used by the lower courts under ERISA, including: 1) "whether the plaintiff or other party was successful in obtaining the relief requested or in defending or conserving the trust estate"; 2) "whether the successful party benefitted or enhanced the trust estate"; 3) "the nature and extent of the defendant's wrongful conduct, and whether there was good faith on the part of the defendant"; and 4) the source from which the costs and fees should be paid.

The five-factor test adequately guides a court's broad discretion to award fees under Section 502(g)(1) by allowing the court to assess the relative culpability of the parties, among a combination of factors that balance the express statutory goal of ready access to the courts and ensuring enforcement of ERISA rights.

II. Hardt Should Have Been Awarded Fees Under Established Precedent, Even If This Court Imposes a Prerequisite to the Five-Factor Test.

Petitioner believes the Court appropriately may dispose of this case on the first question presented by following the express text of Section 502(g)(1) and holding that, because the statute imposes no "prevailing party" requirement, the court of appeals erred in importing *Buckhannon* into a statutory scheme where it should not apply. Nonetheless, should the Court look beyond that narrow question, Hardt is entitled to an award of fees under the standard described in *Ruckelshaus* or *Buckhannon's* "prevailing party" rule.

A. Hardt Satisfies the Standard for Awarding Fees Set Forth in *Ruckelshaus*.

This Court has held that the absence of "prevailing party" language means Congress intends to expand fee-shifting to situations not covered under the "prevailing party" term of art. *See Ruckelshaus*, 463 U.S. at 687-88. In contrast to *Buckhannon*, *Ruckelshaus* does not require judicial action (that is, a "judicial imprimatur") that changes the parties' legal relationship. Instead, *Ruckelshaus* recognized that, under the analogous "whenever . . . appropriate" fee-shifting statutes, a party need only achieve "some success." *See id.* at 684. Indeed, the Court specifically concluded that a court order is *not* required for "success" under the "whenever . . . appropriate" fee-shifting language. The Court found that Congress intended the "whenever . . . appropriate" language to allow fee recovery for "suits that force[] defendants to abandon illegal conduct,

although without a formal court order." *Id.* at 686 n. 8 (citing S. Rep. No. 91-1196 (1970)); *see also Gwaltney*, 484 U.S. at 67 n.6 (noting that, like the Clean Air Act, the Clean Water Act fee-shifting provision protects plaintiffs from "the suddenly repentant defendant").

Thus, under *Ruckelshaus*, a party who pursues a claim under a "whenever . . . appropriate" fee-shifting statute and "obtains, through settlement or otherwise, substantial relief prior to adjudication on the merits" may be eligible for a fee award. *Ohio River Valley Environmental Coalition, Inc. v. Green Valley Coal Co.*, 511 F.3d 407, 414 (4th Cir. 2007) (quoting *Sierra Club v. EPA*, 322 F.3d 718, 719 (D.C. Cir. 2003)). All other circuits to have considered the issue agree. *See, e.g., Association of California Water Agencies v. Evans*, 386 F.3d 879 (9th Cir. 2004); *Loggerhead Turtle v. County Council of Volusia County*, 307 F.3d 1318 (11th Cir. 2002).

As a result, if *Ruckelshaus* applies here, rather than, or as a prerequisite to, the well-established five-factor test, the Court should reverse the Fourth Circuit. It its fee decision, the district court below found that Reliance had awarded Hardt the sought-after benefits "only after having been ordered by the court to provide the kind of meaningful review of the evidence to which [Hardt] was entitled by law." Hardt's complaint was based on Reliance's mishandling and shoddy review of her LTD claim, and she requested LTD benefits and "such other relief . . . to secure [her] rights." JA at 99a-105a (Complaint, ¶41); *id.* at 109a (requesting relief). The district court found that Reliance abused its discretion in terminating Hardt's LTD benefits and that Hardt "did

not get the kind of review to which she is entitled under applicable law." Pet. App. 48a. The district court remanded to Reliance, as the fiduciary administering the plan, for a full and fair review in accordance with the ERISA's claims handling regulations. *Id.*

Hardt's lawsuit and resulting court order remanding the case for a redetermination of benefits caused Reliance to award Hardt the LTD benefits she sought in the case. Obviously, no benefits would have been awarded to Hardt had the district court ruled in the first instance in favor of Reliance. This is sufficient for fees to be awarded under *Ruckelshaus*. *See Ohio River Valley Environmental Coalition*, 511 F.3d at 415.

B. Hardt Satisfies a "Prevailing Party" Standard for Awarding Fees.

Contrary to the Fourth Circuit's decision below, Hardt meets this Court's "prevailing party" standard.

1. A Judicially-Ordered Remand Is Sufficient to Qualify for Fees Under ERISA.

Hardt should be deemed a "prevailing party" by securing a remand, based on a judicial finding that Reliance acted unlawfully in violation of ERISA and which required Reliance to reevaluate Hardt's claim. In finding that Reliance abused its discretion in terminating Hardt's LTD benefits, the district court ruled Reliance breached a fiduciary duty to Hardt by failing to afford her "the kind of review to which she is entitled under applicable law." Pet. App. 48a. *See Metro. Life Ins. Co. v. Glenn*, --- U.S. ---, 128 S. Ct. 2343, 2347 (2008) (considering "a benefit

determination to be a fiduciary act (i.e., an act in which the administrator owes a special duty of loyalty to the plan beneficiaries)."). After identifying deficiencies in Reliance's approach, the district court remanded to Reliance, as the fiduciary administering the plan, for a full and fair review in accordance with the ERISA's claims handling regulations. *Id.*

Securing a court-ordered remand based on an ERISA defendant's misconduct constitutes success on the merits. This Court previously has held that a remand to an administrative agency confers "prevailing party" status in analogous situations arising under the Social Security Act, which uses the "prevailing party" standard for determining fees under the Equal Access to Judgment Act (EAJA), 28 U.S.C. § 2412. *See Shalala v. Schaefer*, 509 U.S. 292 (1993); *Sullivan v. Hudson*, 490 U.S. 877 (1989).

Taken together, *Schaefer* and *Sullivan* establish two complementary principles that trigger fee eligibility in Social Security Act cases: 1) where the district court remands to the agency without retaining jurisdiction, the securing of the remand order itself creates "prevailing party" status because "the plaintiff has succeeded on a[] significant issue in litigation which achieved some of the benefit sought in bringing suit," *Schaefer*, 509 U.S. at 302 (citation and internal punctuation omitted); and 2) when there is such a remand, but the trial court retains jurisdiction, the claimant is a prevailing party only after she succeeds before the agency on remand. *Hudson*, 490 U.S. at 877-88. In the former situation, the plaintiff is entitled to seek and be awarded fees immediately upon remand (and the expiration of the appeal period), whereas in the latter circumstance, the

plaintiff must return to the district court after remand to seek fees. *See Schaefer*, 509 U.S. at 297-98.

The differences between the two scenarios are compelled by the "exclusive methods by which district courts may remand to the Secretary," which "are set forth in sentence four and sentence six of [42 U.S.C.] § 405(g)." *Id.* at 296.[8] A "sentence-four" remand results in the immediate entry of judgment (and relinquishment of jurisdiction) by the district court, whereas in the "sentence-six" remand context judgment is not entered (and the district court retains jurisdiction) until post-remand agency proceedings are complete. *Id.* at 297. "Immediate entry of judgment (as opposed to entry of judgment after postremand agency proceedings have been completed and their results filed with the court) is in fact the principal feature that distinguishes a sentence-four remand from a sentence-six remand." *Id.*[9]

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[8] "Sentence-six remands may be ordered in only two situations: where the Secretary requests a remand before answering the complaint, or where new, material evidence is adduced that was for good cause not presented before the agency." *Id.* at 297 n.2. In contrast, under sentence four "the [district] court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. . ." *Id.* at 297 n.1 (bracket in original).

[9] As to the timing of a fee award, Social Security Act cases, via the fee-shifting provision of EAJA, requires a "final judgment" before an award may issue. Yet, Section 502(g)(1) does not require judgment before a fee award may issue. *Compare* 29 U.S.C. § 1132(g)(1) (no judgment required before fee award); *with* 29 U.S.C. § 1132(g)(2) (requiring judgment before fees may issue). As a result, the lack of a judgment

Sentence-four remands in social security cases and remands in an ERISA case are analogous: In both instances, the remand is based on a legal infirmity with the substance of the administrator's or fiduciary's decision or in the procedures employed. Convincing a court to reverse or vacate an ERISA benefits decision and remand the claim for a redetermination of benefits means a claimant is a "prevailing party" because she "'succeeded on any significant issue in litigation which achieved some of the benefit . . . sought in bringing suit.'" *Schaefer*, 509 U.S. at 302 (quoting *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782, 791-92 (1989), and noting that *Garland* "affirmatively supports the proposition that a party who wins a sentence-four remand order is a prevailing party."). Having a remand order trigger "prevailing party" status upon entry also furthers the goals of the statute, as plan administrators and fiduciaries appropriately will be encouraged to fulfill their fiduciary obligations and handle and determine the claim for benefits properly in the first instance. *See Mizzell v. Provident Life and Accident Insurance Co.*, 32 Fed. Appx. 352, 353 (9th Cir. 2002) (affirming fee award where district court concluded that the plan administrator abused its discretion and remanded benefits claim to plan administrator for a new determination of benefits eligibility); *Sansevera v. E.I. DuPont de Nemours & Co.*, 859 F. Supp. 106, 117 (S.D.N.Y. 1994) (granting attorney's fees to plaintiff whose summary judgment motion was partially granted as to claim that fiduciary acted

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should be immaterial in Section 502(g)(1) cases as to when a fee award may issue.

arbitrarily and capriciously in denying benefits, reasoning that the claimant "was forced to bring this suit in order to receive the fair consideration to which he is entitled. An award of attorney's fees and costs is necessary both to relieve [claimant] of the financial burden undertaken to pursue this action, and to deter other employers from similarly denying an applicant a fair consideration of his or her claim.").

Thus, in ERISA cases, the remand alone provides the judicial imprimatur required by *Buckhannon* for fee awards under "prevailing party" statutes. *See Flom v. Holly Corp.*, 276 Fed. Appx. 615, 617 (9th Cir. 2008) (holding district court erred in denying a disability benefit claimant's motion for attorney's fees against the plan administrator under § 502(g)(1) where the district court's remand to the administrator provided the "judicial imprimatur required by *Buckhannon*" for the claimant to be a prevailing party because it created "a judicially-sanctioned change" in claimant's "legal relationship with [the administrator] and ultimately led to [claimant's] success in securing a reinstatement of benefits."); *Mizzell*, 32 Fed. Appx. at 354 (affirming fee award in benefits case based on remand because plaintiff "succeeded on a significant issue in litigation, *i.e.*, whether [the plan administrator] abused its discretion in denying [plaintiff's] claim, which achieve[d] some of the benefit [plaintiff] sought in bringing suit, *i.e.*, to obtain a full and fair review of his claim.") (some internal punctuation omitted). For that reason, the district remand order here made Hardt a prevailing party.

And even if the proper analogy were the sentence-six remand, the district court in this case retained jurisdiction, and Hardt secured the benefits on remand. The parties reported the award of benefits after the remand to the district court, which thereafter entered judgment. Hardt thus is eligible for an award of fees as a "prevailing party" under *Hudson*.

In sum, Hardt is a "prevailing party" under the reasoning of *Schaefer* and *Hudson* based solely on the remand order. The Court should reverse the Fourth Circuit decision below.

2. Hardt Satisfies the Prevailing Party Standard in *Buckhannon*.

In *Buckhannon*, the Court held that the term "prevailing party" required a "'material alteration of the legal relationship of the parties'" or a "court ordered 'change [in] the legal relationship between [the plaintiff] and the defendant.'" 532 U.S. at 604 (quoting *Garland*, 489 U.S. at 792 (alterations in *Buckhannon*)). As examples of the types of actions that would convey the necessary "judicial imprimatur," the Court offered "settlement agreements enforced through a consent decree" and "judgments on the merits." *Buckhannon*, 532 U.S. at 604-05. The Court specifically held that the "'catalyst theory' falls on the other side of the line from these examples" because "it allows an award where there is no judicially sanctioned change in the legal relationship of the parties." 532 U.S. at 605. For additional examples of actions that would not convey the necessary imprimatur, the Court mentioned successful results obtained through private settlement agreements, non-dispositive victories such as

surviving a motion to dismiss for lack of jurisdiction, withstanding a motion to dismiss for failure to state a claim upon which relief may be granted, or receiving an interlocutory ruling that reversed a dismissal for failure to state a claim. *See id.* at 604-06 & n.7. The Court further explained that "[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change." *Id.*

Contrary to the Fourth Circuit's decision below, the holding and rationale in *Buckhannon* did not limit attorney's fee awards only to cases in which there is either a final judgment on the merits or a consent decree. Rather than defining these two forms of relief as the "only" ways in which a party could "prevail" for purposes of recovering fees and costs, the Court expressly used these forms of relief as discrete "examples," 532 U.S. at 605, from precedent, showing the requirement for the "judicial imprimatur" changing the parties' legal relationship. *Id.*

That *Buckhannon's* "prevailing party" status is not limited "only" to court-ordered consent decrees and enforceable judgments on the merits is further supported by the fact that two members of the majority noted that court-approved settlements, in addition to consent decrees, bore the necessary judicial imprimatur. 532 U.S. at 618 (Scalia, J., concurring, joined by Thomas, J.). *See also Truesdell v. Phila. Hous. Auth.*, 290 F.3d 159, 165 (3d Cir. 2002) (Alito, J.) ("We do not agree with the District Court's conclusion that the parties' settlement was an inappropriate basis for an award of attorney's fees."; holding court-ordered settlement containing

mandatory language and allowing enforcement satisfied *Buckhannon* under Section 1988 fee-shifting statute); *Robertson v. Guiliani*, 346 F.3d 75, 81 (2d Cir. 2003) ("[I]t seems clear from even the majority opinion in *Buckhannon* that the Court intended its statements about judgments on the merits and court-ordered consent decrees as merely 'examples' of the type of judicial action that could convey prevailing party status . . . We therefore join the majority of courts to have considered the issue since *Buckhannon* in concluding that judicial action other than a judgment on the merits or a consent decree can support an award of attorney's fees, so long as such action carries with it sufficient judicial imprimatur."). Moreover, *Schaefer*, which *Buckhannon* neither listed as an example nor questioned, held that a "sentence-four" remand to an administrative agency was a judgment that satisfied the "prevailing party" requirement.

Buckhannon did not need to provide a complete catalog of the various forms of judicial relief that a party must obtain in order to be a "prevailing party" for purposes of an award of attorney's fees under statutes using that term of art because, in that case, the litigation was resolved without judicial involvement. Rather, the State legislature repealed the statute at the heart of petitioner's lawsuit for declaratory and injunctive relief, thereby mooting the case. 532 U.S. at 601. Thus, in *Buckhannon*, legislative action – not judicial action -- provided the plaintiff the desired relief. *Id.* at 601.

Here, by sharp contrast, judicial action altered the parties' relationship. The facts of this case cannot reasonably be read to suggest that Reliance

"voluntarily change[d] [its] conduct." *Buckhannon*, 532 U.S. at 605; *see* BLACK'S LAW DICTIONARY 1569 (7th ed. 1999) (Voluntary means "not impelled by outside influence.").

In her complaint, Hardt specifically pointed to Reliance's procedural error and improper review of her LTD claim. JA 90a-110a. She requested LTD benefits and "such other relief . . . to secure her rights." JA at 108a-110a.[10] The remand provided Hardt a form of relief she sought via her complaint and therefore constitutes formal success on the merits. The district court's remand order constitutes judicially-ordered relief to Hardt for the ERISA violations, as the court effectively granted Hardt partial summary judgment on her claim that Reliance violated ERISA in its handling and review of her request for LTD benefits and abused its discretion in terminating those benefits. *See Sansevera*, 859 F. Supp. 106, 117 (S.D.N.Y. 1994).

Moreover, the district court retained the authority to enforce its remand order, coupled with the express threat of entry of judgment against Reliance in the event of non-compliance. Indeed, the district court specifically "**INSTRUCT[ED]** Reliance to act on [Hardt's] application by adequately considering all the evidence discussed within this Opinion within thirty (30) days of its date of issuance," or "judgment will be issued in favor of [Hardt]." Pet. App. 49a (emphasis in original). The district court subsequently reinforced that order with another order noting the reconsideration deadline (which the district

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[10] The Fourth Circuit's conclusion that Hardt did not seek this relief simply is incorrect.

court had extended once at Reliance's request) had passed and required the parties to file a status report within seven days. JA at 113a-114a. The order cautioned that "[a]ny failure by Reliance to comply with the court's [reconsideration] deadline will result in judgment being entered in favor of the plaintiff," per the previous order, and concluded that "[s]hould the parties fail to submit a timely status report, judgment will be entered in favor of the plaintiff." *Id.* at 114a.

When Reliance finally changed its position and awarded continued LTD benefits to Hardt, it filed the required status report "confirming its compliance with the Court's Order" and that it "acted within the specified time frame and found Ms. Hardt eligible for benefits." JA 115a (Docket 49). Thus, Reliance expressly acknowledged that the lawsuit and the district court's remand order changed the legal relationship of the parties.

The district court therefore appropriately found that Reliance's change in position was not voluntary. The court determined that "it was [Reliance's] goal from the beginning to deny [Hardt] the benefits she had claimed" and that Reliance "has opposed [Hardt's] position throughout the course of this litigation." The court additionally found the record "replete with instances of [Reliance's] staunch opposition to awarding any benefits to [Hardt]," prior to the remand order. As a matter of fact, the district court ruled that Reliance awarded Hardt the sought-after benefits, but "only after having been ordered by the court to provide the kind of meaningful review of the evidence to which [Hardt]

was entitled by law." *Id.* at 22a-23a. That judicial finding, not challenged on appeal, is conclusive here.

Accordingly, this case does not fall on the "voluntary change in conduct" side of the line established by *Buckhannon*. Rather, the court-ordered remand changed the parties' legal relationship, requiring Reliance to give Hardt the full and fair review to which she was entitled by law in the first instance.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with instructions that the district court reinstate its award of attorney's fees and costs and conduct any other appropriate proceedings concerning Hardt's entitlement to additional attorney's fees and costs in light of the appeals.

Respectfully submitted,

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February 25, 2010

APPENDIX

29 U.S.C. § 1132(g) on following page

Section 502(g) of ERISA (29 U.S.C. §1132(g)) provides:

g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph 2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of the action to either party.

(2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1986.

RESPONDENT'S BRIEF

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In The Supreme Court of the United States

BRIDGET HARDT,

Petitioner,

v.

RELIANCE STANDARD LIFE INSURANCE COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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QUESTIONS PRESENTED

1. Whether ERISA §502(g)(1) provides a district court discretion to award attorney's fees to a party who has not achieved "some success on the merits."

2. Whether a district court has discretion to award attorney's fees to a plaintiff under §502(g) when it "remanded" the claim to a private claims administrator to "fully and adequately assess the claim" and the administrator, in an exercise of the discretion granted it by the plan, and on consideration of the existing record, as well as new medical evidence submitted by the plaintiff, allows the claim on "remand."

RULE 29.6 STATEMENT

Respondent Reliance Standard Life Insurance Company hereby discloses that it is a subsidiary of Reliance Standard Life Insurance Company of Texas, which in turn is a subsidiary of Delphi Financial Group, Inc., which is a publicly held corporation.

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STATEMENT

Dan River, Inc., as part of its employee welfare plan under the Employment Retirement Investment Security Act, 29 U.S.C. §1001 *et seq.* ("ERISA"), chose to provide long-term disability coverage to its employees. Pet.App. 31a, 32a. Reliance Standard Life Insurance Company ("Reliance") insured the long-term disability plan (the "Plan") and was responsible for deciding claimants' eligibility for benefits under the Plan. *Id.*, at 32a. The Plan provided that Reliance, as the claims-review fiduciary, "has the discretionary authority to interpret the Plan and the insurance policy and to determine eligibility for benefits." JA 47a.

Bridget Hardt was employed by Dan River as an executive assistant. Pet.App. 32a. After complaining of pain in her neck and shoulders, Ms. Hardt was diagnosed with carpal-tunnel syndrome and underwent surgery on both wrists. *Ibid.* She stopped working on January 23, 2003. *Ibid.* Several months later, Ms. Hardt submitted a claim to Reliance for long-term disability benefits. *Ibid.* Ms. Hardt stated she was unable to work due to pain and numbness in her hands, arms, shoulders, and neck. *Ibid.* Under the plan, following a period of short-term disability, Ms. Hardt could initially obtain twenty-four months of total-disability if she was unable to perform the "material duties" of her "regular occupation." *Ibid.* After those twenty-four months, the plan's definition of "total disability" provided that, to continue receiving benefits, the claimant must be

totally disabled from "any occupation," not just her own. JA 37a-38a.

Reliance provisionally approved the initial total-disability claim based on the medical records submitted by Ms. Hardt. *Ibid.* Reliance then asked her to undergo a functional capacity evaluation ("FCE"). Pet.App. 32a. Ms. Hardt told the therapist that, in addition to pain in her neck, left shoulder, and hands, she also suffered from lower-back pain, hypertension, and anxiety. *Id.*, at 32a-33a. The therapist concluded that Ms. Hardt was capable of performing sedentary work if she was limited to lifting four to five pounds on an occasional basis and two to three pounds on a frequent basis. *Id.*, at 33a. Based on these findings, Reliance denied the claim. Ms. Hardt appealed, contending that her job was more demanding than "sedentary occupations." Fourth Circuit Joint Appendix ("CA4JA") 166-68. Reliance granted the appeal, concluding based on her new explanation that she was totally disabled from her "regular occupation," which entitled her to twenty-four months of benefits. Pet.App. 33a.

Near the end of the twenty-four month period, Reliance evaluated Ms. Hardt's eligibility for benefits under the stricter "totally disabled from any occupation" standard. CA4JA 166-68. According to the earlier FCE, Ms. Hardt was capable of working at a sedentary job that did not require lifting substantial weight. Pet.App. 33a. Based on these qualifications, a vocational expert performed a residual employability

analysis and identified several alternative occupations that Ms. Hardt could do. CA4JA 167-68. Reliance notified Ms. Hardt on April 19, 2005, that, following the twenty-four month period, she would no longer be eligible for benefits. Pet.App. 36a.

Ms. Hardt appealed the denial to Reliance. Pet.App. 36a. Because the original evaluation of Ms. Hardt's functional capacity was two years old, Reliance, under the terms of the policy, asked Ms. Hardt to undergo a new FCE. Pet.App. 36a. After cancelling the first exam in October, Ms. Hardt eventually agreed to undergo the FCE on December 29, 2005. CA4JA 143-55. However, during the exam, Ms. Hardt refused to perform many of the tests. Pet.App. 36a. The examiner reported that Ms. Hardt had given a "very poor effort or voluntary submaximal effort which is not necessarily related to pain, impairment, or disability." Pet.App. 36a, 37a. On this basis, the examiner deemed the test results "invalid." *Ibid.*

Due to Ms. Hardt's failure to cooperate, Reliance scheduled another FCE. Pet.App. 37a. When this took place on January 26, 2006, the examiner reported that Ms. Hardt again failed to cooperate. Pet.App. 37a. As the examiner stated, Ms. Hardt "passed only 29/92 validity criteria * * * which suggests very poor effort or voluntary submaximal effort which is not necessarily related to pain, impairment, or disability," and that the testing indicated "a non-organic component" to her condition. CA4JA 459.

At Reliance's request, Ms. Hardt's medical records were reviewed by Michael Leibowitz, M.D., who is board-certified in Physical Medical and Rehabilitation. Pet.App. 37a. Dr. Leibowitz concluded that the carpal-tunnel surgery on Ms. Hardt's wrists had been successful, as documented by electrodiagnostic studies. *Ibid.* Dr. Leibowitz opined that the prognosis for Ms. Hardt's cervical symptoms was good and that she would continue to improve. *Ibid.* He acknowledged the diagnosis of hereditary small-fiber neuropathy from one of Ms. Hardt's doctors, but questioned whether it was correct. *Ibid.* Based on this review, Dr. Leibowitz concluded that Ms. Hardt was capable of working full-time at a sedentary job that did not require lifting substantial weight. CA4JA 447.

An independent vocational evaluation was also performed to determine whether "any occupations" were suitable for Ms. Hardt. Pet.App. 38a. A vocational specialist performed a labor-market survey and identified eight suitable positions near Ms. Hardt's home that were available. Pet.App. 38a. After reviewing the medical and vocational information, Reliance concluded again that Ms. Hardt was not totally disabled from "any occupation." *Ibid.*

Ms. Hardt filed this action in the District Court for the Eastern District of Virginia on March 5, 2007. JA 7a, 90a-112a. She sought long-term disability benefits under the plan, plus interest and attorney's fees. JA 108a-10a. The parties filed cross-motions for summary judgment, which the district court considered under the "modified abuse of discretion"

standard applicable under ERISA. JA 12a, 15a. Reliance contended that its denial of her claim was not an abuse of discretion because, among other things, her claim relied almost entirely on out-dated medical records, she had affirmatively failed to cooperate, and the decision was fully supported by the medical records and Dr. Leibowitz's report. Defendants' Combined Response to Plaintiff's Motion for Summary Judgment (Dist. Ct. Dkt. No. 34) 2.

The district court denied both parties' motions, declining to rule as a matter of law that Ms. Hardt was or was not entitled to benefits. As a procedural matter, however, the court concluded that the denial of the claim had been based on "incomplete information," and that "Ms. Hardt did not get the kind of review to which she was entitled." Pet.App. 48a. On its own motion, the court "remanded" the case to Reliance "to address the deficiencies in [its] approach" and "fully and adequately assess Ms. Hardt's claims." *Ibid.* Reliance, in turn, was foreclosed from obtaining further review of the decision because ERISA "remands" to private claims administrators are generally not considered final appealable orders. See, *Bowers* v. *Sheet Metal Workers' Nat'l Pension Fund*, 365 F.3d 535 (6th Cir. 2004).[1]

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[1] As Reliance later noted, although not subject to appeal, the district court's "remand" order was legally erroneous under ERISA. Appellant's Br. 22-25. Among other things, Reliance noted that the district court improperly criticized the FCEs for failing to assess the impact of neuropathic pain because FCEs

(Continued on following page)

Shortly after the ERISA "remand" to Reliance, Ms. Hardt's counsel delivered a number of new medical records to Reliance. Appellee's Br. 4.[2] In addition to considering the new evidence submitted by Ms. Hardt, Reliance also sent Ms. Hardt for an Independent Medical Examination ("IME"). See Plaintiff's Rebuttal to Defendants' Opposition to Plaintiff's Motion for Attorneys' Fees (Dist. Ct. Dkt. No. 54), at 9-10; Memorandum of Law in Support of Plaintiff's Motion for Attorney's Fees (Dist. Ct. Dkt. No. 52), Exhibit 3 (pp. 9-11). Relying in part on the new evidence, including a new Magnetic Resonance Imaging ("MRI") test performed approximately a year after Reliance had denied Ms. Hardt's appeal, the IME concluded that "Ms. Hardt's condition will continue to deteriorate." IME, at 2-3, 6-7 ("A repeat or follow-up lumbar MRI scan was done 3/24/07 which was compared by the radiologist showing progressive changes. When the scan was reviewed it did indeed

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document an individual's ability to work *regardless of the cause*; failed to address Reliance's right to rely on the reports from two examiners that Ms. Hardt had given "very poor effort or voluntary submaximal effort"; improperly found that Reliance was required to credit subjective complaints of pain, even though Fourth Circuit precedents establish the contrary; and relied on inapplicable precedents under the Social Security Act. *Ibid.*

[2] Ms. Hardt's counsel also spent considerable time "updat[ing]" her medical records to submit additional information to Reliance in support of her claim on remand. Memorandum of Law in Support of Plaintiff's Motion for Attorney's Fees (District Court Dkt No. 52), Exhibit 3 (pp. 9-11).

show * * * marked changes * * * * "). Appellant's Br. 11; Memorandum of Law in Opposition to Plaintiff's Motion for Attorney's Fees (Dist. Ct. Dkt. No. 53), at 3-4.[3]

On a review of the full record, including the new medical evidence and IME, Reliance concluded that Ms. Hardt's medical condition at the time of the "remand" constituted a total disability and awarded her benefits contingent on "periodic proof of * * * continuing 'Total Disability.'" JA 120a-21a.

Ms. Hardt filed a motion for attorney's fees and costs under ERISA §502(g)(1), contending that she "has prevailed under ERISA in obtaining a remand of Reliance's prior decision to deny her disability benefits." JA 22a, 118a. In granting her motion and awarding fees, the district court recognized that its prior "remand" order had "not sanction[ed] a certain result on remand," and that, "*[h]ad the defendant* completed its review [on "remand"] in the manner

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[3] The IME is apparently not part of the district court record. Concurrent with filing this brief, Respondent is sending a letter to the Clerk pursuant to Supreme Court Rule 32.3 requesting permission to lodge the IME with the Court. The IME is also referenced in the invoices submitted by Petitioner in support of her fee petition. Memorandum of Law in Support of Plaintiff's Motion for Attorney's Fees (Dist. Ct Dkt No. 52), Exhibit 3 (p. 11) ("Correspondence * * * re: IME Report * * * "); Memorandum of Law in Opposition to Plaintiff's Motion for Attorney's Fees (Dist. Ct. Dkt. No. 53), at 4; Plaintiff's Rebuttal to Defendants' Opposition to Plaintiff's Motion for Attorney's Fees (Dist. Ct. Dkt. No. 54), at 9.

ordered by the court and in the prescribed time period, and again *determined that the plaintiff was not eligible for benefits, it is certainly possible that the court would have found the result satisfactory.*" Pet.App. 19a, 20a n.5 (emphasis added). Nevertheless, the district court found that Ms. Hardt was entitled to attorney's fees because "[t]he court sanctioned a material change in the legal relationship of the parties by ordering the defendant to conduct the type of review to which the plaintiff was entitled." Pet.App. 22a. The court disposed of the rest of the case with a dismissal: "It appearing to the court that no further legal issues remain to be resolved in this matter, the case is DISMISSED." Pet.App. 30a.

Reliance appealed to the Fourth Circuit on the ground that, under Fourth Circuit precedent, Ms. Hardt could be eligible for attorney's fees under §502(g)(1) only if she were a "prevailing party," and here she was not a "prevailing party." As Reliance framed it, "[t]here is only one question raised in this appeal. Is Ms. Hardt a 'prevailing party?'" Appellant's Br. 15; Reply Br. 1. Ms. Hardt did not deny this characterization of the lone issue on appeal, nor did she argue that §502(g)(1) includes no "prevailing party" requirement. Instead, Ms. Hardt limited her argument to urging that "[b]ecause *Ms. Hardt was the prevailing party* in this matter, she is entitled to an award of attorney's fees * * * * " Appellee's Br. 15, 17, 21, 23. She never argued there is no "prevailing party" requirement under §502(g)(1) nor invited the Fourth Circuit to reconsider its longstanding rule on

this point.[4] See Appellee's Br. 1-38. The Fourth Circuit agreed with Reliance that Ms. Hardt was not a prevailing party, Pet.App. 11a, and Ms. Hardt filed her petition for certiorari.

SUMMARY OF ARGUMENT

ERISA §502(g)(1) provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." On its face, the statute contains no express "success" requirement. It does not expressly demand, like so many statutes, that a claimant be a "prevailing party" before receiving

[4] Accordingly, Petitioner failed to raise below the first question presented on certiorari, see, *e.g.*, JA 118a; Mem. in Support of Motion for Attorney's Fees and Costs (Dist. Ct. Dkt. No. 52), at 2, 3, 9; Appellee's Br 15-17, 21-28, 34, 38. For that reason, the Fourth Circuit did not address it. Pet.App. 7a-8a. And because Petitioner did not raise or preserve this issue below, this Court should decline to consider it. See, *e.g.*, *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised below nor considered by the Court of Appeals, this Court will not ordinarily consider them.")

If the Court declines to address the first question, the second question alone does not merit the Court's consideration. Question two, which occupied only five pages of the petition for certiorari, concerns the application of the relevant legal standard to Ms. Hardt's facts. If the legal standard is not properly at issue, the Court should dismiss the writ. See *Tacon* v. *Arizona*, 410 U.S. 351, 352 (1973) (dismissing writ as improvidently granted where record established that principal issue as to which certiorari was granted was not raised or decided below).

attorney's fees. Nor does it expressly provide that a non-prevailing party may be eligible for fees.

This Court has before addressed just such a statute. In *Ruckelshaus* v. *Sierra Club,* 463 U.S. 680 (1983), the Court considered the attorney's-fees provision of the Clean Air Act, which allowed fees "whenever [the court] determines that such an award is appropriate." This case is controlled by *Ruckelshaus*.

First, the *Ruckelshaus* Court established a clear statement rule: given the longstanding "American rule" that each party bears its own costs, if Congress wishes to allow non-prevailing parties to recover attorney's fees, it must do in unmistakably clear terms. Nothing in ERISA §502(g)(1) satisfies that clear statement rule.

Second, *Ruckelshaus* considered the import of Congress's decision not to include an express success requirement. The Court found that the omission of terms like "prevail" or "success" "modifies but does not completely reject the traditional rule that a fee claimant must 'prevail' before it may recover attorney's fees." *Id.*, at 686. As the Court explained, this "modified prevailing party" standard "expand[s] the class of parties eligible for fee awards from prevailing parties to *partially prevailing* parties." *Id.,* at 688 (emphasis added).

Applying that analysis, *Ruckelshaus* defined what constitutes a "partially prevailing party." The Court held that, absent a clear statement to the contrary, to be eligible for attorney's fees, a claimant

must demonstrate "some success on the merits." And, the Court explained, "purely procedural victories" would not suffice.

Thus, under *Ruckelshaus*, the absence of words like "prevailing party" in a fee-shifting statute decreases the *quantum* of success required to be eligible for attorney's fees, but it does not change the *nature* of the success required. One need not succeed on every claim in a case—partial success is enough—but one must necessarily succeed *on the merits*.

Petitioner cannot satisfy the *Ruckelshaus* requirement of "some success on the merits." The only judicial relief Ms. Hardt obtained was a "remand" to a private ERISA claims administrator, and that relief was purely procedural. It did not resolve or purport to resolve any of the substantive claims she presented, and so it could not constitute success "on the merits."

In *Hanrahan* v. *Hampton*, 446 U.S. 754, 758 (1980), the Court addressed a judicial remand for a new trial, and concluded that attorney's fees were not allowed because, by merely securing a remand, claimants had "not prevailed on the merits of any of their claims." The same is true here.

Nor does Petitioner's "hybrid" theory save her claim. Petitioner suggests that an ERISA "remand" *plus* the subsequent award of benefits, together constitutes sufficient success for an award of attorney's fees. However, the award of benefits by an ERISA claims administrator is a voluntary decision by a private party, pursuant to the terms of a voluntarily

adopted ERISA plan. It lacks the requisite "judicial imprimatur" to constitute success "on the merits." See *Buckhannon Bd. & Care Home, Inc.* v. *W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001).

And if the initial "remand" was procedural, then no subsequent action by a private party can retroactively render it substantive. This is especially so where, as here, the ultimate award of benefits came only after the introduction of substantial new evidence concerning Petitioner's medical condition. Given that new evidence, it is entirely possible that *both* of Reliance's disability determinations were substantively correct: that, at the time of the first determination, Ms. Hardt did not in fact substantively meet the plan criteria for disability, and, at the time of the second determination—following the introduction of new medical information and a new MRI—she did meet those criteria. Although she is now receiving benefits, she did not obtain judicial relief "on the merits."

Even more fundamentally, success "on the merits," by definition requires a judgment. Whether it is necessary to "prevail in part" (per a *Ruckelshaus*-type statute like §502(g)(1)) or "prevail in full" (per a *Buckhannon*-type statute), *Buckhannon* teaches that one measures "prevailing" by examining, not "judicial pronouncements" and not "nonjudicial alteration of actual circumstances," but ultimate judicial judgments.

Here, the judgment was dismissal. And that, by no measure, constitutes "some success on the merits."

ARGUMENT

I. UNDER THIS COURT'S PRECEDENT, A DISTRICT COURT MAY NOT AWARD ATTORNEY'S FEES UNDER ERISA SECTION 502(g)(1) UNLESS THE PARTY ACHIEVES "SOME SUCCESS ON THE MERITS"

Petitioner's argument is straightforward. The text of §502(g)(1) does not contain the words "prevailing party," but instead grants the district court authority to award fees and costs "in its discretion * * * to either party." Accordingly, a litigant need not be a prevailing party to receive attorney's fees under that section, and a district court has wide "discretion" to award attorney's fees as it deems appropriate.

That simple argument, however, runs afoul of decades of this Court's precedents. In the context of attorney's fees, the Court has consistently declined to sanction unfettered discretion, as the Chief Justice recently explained for a unanimous Court:

> Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike. See Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982). For these reasons, *we have often limited courts' discretion to award fees despite the absence of express legislative restrictions.*

Martin v. *Franklin Capital Corp.*, 546 U.S. 132, 139 (2005) (emphasis added).

The fee provision in §502(g)(1) is no different.[5] An examination of this Court's precedent, the statutory text, and legislative context all demonstrate that, to be eligible for fees under that section, a party must achieve "some success on the merits."

A. *Ruckelshaus* v. *Sierra Club* Established a Clear-Statement Rule Before Congress Will Be Deemed To Have Allowed Non-Prevailing Parties To Obtain Attorney's Fees, and Established a Bright-Line Rule that, Absent a Clear Statement to the Contrary, a Party Must Achieve "Some Success on the Merits" To Receive Attorney's Fees

Before turning to the specific text of §502(g)(1), one must first understand the background rules of construction that this Court mandated in *Ruckelshaus*, 463 U.S. 680 (1983). The question there, like here, was whether a party that had achieved no litigation success on the merits could nonetheless be eligible for attorney's fees. The Court applied the fee-shifting provision of the Clean Air Act, 42 U.S.C. §7607(f), which provides:

> In any judicial proceeding under this section, the court may award costs of litigation

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[5] Notably, the Court has twice in passing observed that under §502(g), attorney's fees are "normally awarded only to prevailing parties." *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 89 n.14 (1982); see also *Pegram* v. *Herdrich*, 530 U.S. 211, 236 (2000).

> (including reasonable attorney and expert witness fees) *whenever it determines that such award is appropriate.*

463 U.S., at 700-01 (emphasis added). Like §502(g)(1), the fee-shifting provision of the Clean Air Act did not contain any express success requirement. And, like §502(g)(1), the statutory text could be simplistically read to sanction virtually unfettered discretion "whenever appropriate".

The Court began its opinion by recognizing that, under the longstanding "American rule," "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 263 (1975). Although "[t]he federal judiciary has recognized several exceptions to the general principle that each party should bear the costs of its own legal representation," *F.D. Rich Co.* v. *United States*, 417 U.S. 116, 129 (1974), "[t]he rule here has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 (1967).

Given that *prevailing* parties generally do not obtain their attorney's fees, absent an express statutory provision allowing such recovery, the Court concluded *a fortiori* that it would be "novel" and "radical" to allow fees to *losing* parties. *Ruckelshaus*, 463 U.S., at 693-94. Therefore, after analyzing the Court's precedents, as well as the text and legislative history

of the attorney's-fee provision at issue, *Ruckelshaus* made two holdings—both critical here.

First, recognizing that Congress legislates with a full awareness of the underlying context of the American rule, the Court established a clear statement rule to depart from that norm:

> Before we will conclude Congress abandoned this established principle that a successful party need not pay its unsuccessful adversary's fees—rooted as it is in intuitive notions of fairness and widely manifested in numerous different contexts—*a clear showing that this result was intended is required.*

Id., at 685 (emphasis added). And, the Court concluded, "if Congress intended such a novel result * * * it *would have said so in far plainer language* than that employed [in the Clean Air Act]." *Id.*, at 693-94 (emphasis added).

Second, the Court did accord some significance to the fact that the statutory language Congress had chosen in the Clean Air Act did not include an express "success" requirement. As a result, the Court determined that the statute "modifies but does not completely reject the traditional rule that a fee claimant must 'prevail' before it may recover attorney's fees." *Id.*, at 686. To wit, the fee provision "was meant to expand the class of parties eligible for fee awards from prevailing parties to *partially prevailing* parties—parties achieving *some success*, even if not major success." *Id.*, at 688.

Then, the Court addressed what constitutes "some success":

> Of course, we *do not mean to suggest* that trivial success on the merits, or *purely procedural victories*, would justify an award of fees under statutes setting out the when "appropriate" standard.

Id., at 688 n.9 (emphases added).

Accordingly, the Court established a bright-line minimum before attorney's fees could be awarded:

> [W]e hold that, absent [1] *some degree of success* [2] *on the merits* by the claimant, it is not "appropriate" for a federal court to award attorney's fees under §307(f).

Id., at 694.

In those 29 precisely chosen words, the Court stated its central holding. Yet when Petitioner and the Solicitor General characterize the case, both omit three—"on the merits." See Pet. Br. 38 ("*Ruckelshaus* recognized that, under the analogous 'whenever * * * appropriate' fee-shifting statutes, a party need only achieve 'some success.'"); U.S. Br. 20 ("Unlike in the application of the traditional 'prevailing party' requirement, a fee award could be 'appropriate' under the Clean Air Act provision as long as there was 'some degree of success.'").

Those three words, "on the merits," control the outcome in this case. They are essential to the express holding in *Ruckelshaus*, and they appear

repeatedly throughout the opinion. See 463 U.S., at 681, 682, 688 n.9, 693, 694.

Accordingly, the twin holdings of *Ruckelshaus* were: (1) a clear statement is required before Congress will be deemed to have allowed attorney's fees to be awarded to non-prevailing parties; and (2) in the absence of such a clear statement, to be eligible for attorney's fees a claimant must demonstrate "some success on the merits." Both holdings, in turn, dictate the legal rule that applies here.

B. The Statutory Language and History of ERISA §502(g)(1) Accord Fully with the *Ruckelshaus* Rule That, To Recover Attorney's Fees, a Party Must Achieve "Some Success on the Merits"

The text of ERISA §502(g)(1) provides:

> In any action under this subchapter (other than an action described in paragraph 2) by a participant, beneficiary, or fiduciary, the court in its *discretion* may allow a reasonable attorney's fee and costs of the action to *either party*.

29 U.S.C. §1132(g)(1) (emphases added).

1. Section 502(g)(1) Does Not Satisfy the Clear Statement Rule of *Ruckelshaus*

Like the Clean Air Act, §502(g)(1) does not contain any express "success" requirement, nor does

it explicitly authorize a losing party to obtain fees. Thus, as even Petitioner concedes, both provisions are "analogous," Pet. Br. 38; indeed, there is no principled difference between "may award [fees] * * * whenever * * * appropriate" and "in its discretion may allow [fees] * * * to either party."[6]

Therefore, on its face, §502(g)(1) fails to satisfy the clear statement rule.

Nevertheless, *without even acknowledging the Ruckelshaus clear statement rule*, both Petitioner and the Solicitor General at least obliquely suggest that §502(g)(1) would allow attorney's fees to be awarded to a litigant who was altogether unsuccessful. See Pet. Br. 36 ("Applying these factors *generally* will mean that fees are limited to litigants who have achieved at least some degree of success * * * * *") (emphasis added); U.S. Br. 18 ("An award of fees would *almost never* be appropriate under §502(g)(1) when a party was wholly unsuccessful * * * * *") (emphasis added).

To say that to receive attorney's fees, one "generally" must have some success or "almost never" will be "wholly unsuccessful," is necessarily to imply that *sometimes*, fees can be awarded when a litigant

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[6] See *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 416 (1978) (analogizing statutory language in *Ruckelshaus* with statutory language in the Trust Indenture Act of 1939 and the Securities Exchange Act of 1934, both of which are virtually *identical* to the ERISA fee-shifting provision).

has been altogether unsuccessful. And that result—and the legal rule that generates it—is utterly inconsistent with this Court's square holdings in *Ruckelshaus*.

2. ERISA's Statutory History Is Altogether Consistent with the *Ruckelshaus* Requirement of "Some Success on the Merits"

Congress enacted ERISA in 1974 to replace the Welfare and Pension Plans Disclosure Act ("WPPDA"), which Congress had adopted in 1958 to deter pension plan abuses. 72 Stat. 997 (1958) (repealed as amended by ERISA, 88 Stat. 851 (1974)). The WPPDA contained a fee-shifting provision that, unlike §502(g)(1), permitted an award of fees, but only to "plaintiffs":

> The court * * * may in its discretion, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

29 U.S.C. §308(c) (repealed 1974).

Early versions of ERISA's fee-shifting provision, including H.R. 6498 (1968) and S. 4327 (1970), contained similar language: "The court * * * may in its discretion, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." See ERISA Legis. History 64, 68 & 69 (A&P).

Congress, however, declined to adopt the WPPDA provision in ERISA. Instead, Congress adopted §502(g)(1), which, unlike the WPPDA, gave district courts "discretion" to award fees to "either party."

Unfortunately, there is almost no legislative history explaining why Congress changed the attorney's-fee provision. See *Armistead* v. *Venitron Corp.*, 944 F.2d 1287, 1303 (6th Cir. 1991) ("[n]o meaningful history exists to provide guidance to the courts" on the meaning of §502(g)(1)). Petitioner would have the Court focus exclusively on the omission of an express "success" requirement, but there are several other possible explanations for what Congress was trying to do—all of which can be derived from the differences in text between §502(g)(1) and the WPPDA.

Those textual differences—and what Congress was potentially trying to accomplish through the new statutory language—can be divided across three axes:

(1) the degree of *certainty* with which fees will be awarded, *i.e.*, whether they are automatic or discretionary;

(2) *to whom* fees can be awarded, *i.e.*, only to plaintiffs, or to both plaintiffs and defendants; and,

(3) the degree of *success* required before a party can receive fees.

Petitioner's narrative focuses exclusively on the third axis, to the exclusion of the first two. Instead, each axis should be examined in turn.

a. When ERISA Was Enacted "Prevailing Party" Statutes Had Been Read Expansively To Award Fees Almost Automatically in Any Case in Which the Plaintiff Had Prevailed

When Congress crafted the language of §502(g)(1), it chose not to include an express "prevailing party" requirement. To understand why, it is necessary to understand how "prevailing party" statutes had been interpreted at that time. See generally *Ruckelshaus*, 463 U.S., at 678 ("In determining the meaning of the Senate Report's rejection of the 'prevailing party' standard it first is necessary to ascertain what this standard was understood to mean.").

At the time of ERISA's enactment, courts had interpreted "prevailing party" expansively, as requiring a near-automatic award of fees. For example, in *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), the Court had broadly interpreted the fee-shifting provision in the Civil Rights Act of 1964, which provided, in relevant part, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee." 42 U.S.C. §2000a-3(b). Although this provision appears, on its face, to allow the district court considerable leeway in deciding whether to award fees, this Court nevertheless held that "one who succeeds in obtaining an injunction under that Title *should ordinarily recover an attorney's fee unless special circumstances*

would render such an award unjust." *Piggie Park*, 390 U.S., at 966 (emphasis added).

Later, in 1973—the year before ERISA was passed—the Court extended *Piggie Park's* automatic fee-shifting to §718 of the Emergency School Aid Act of 1972. See *Northcross* v. *Bd. of Educ.*, 412 U.S. 427, 428 (1973); see also *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 415 (1975) (extending *Piggie Park* to Title VII).[7]

Given those recent decisions, Congress may have chosen to use a different attorney's fees formulation in ERISA to avoid the "mandatory" judicial gloss that had been read into "prevailing party" statutes. Cf. *Ruckelshaus*, 463 U.S., at 688 (explaining that the predecessor statute to the Clean Air Act provided for mandatory attorney's fees for prevailing parties, and "Congress almost certainly rejected [another proposed 'prevailing party' standard] because it *required* fee awards to 'prevailing parties' ").

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[7] Some courts still interpret "prevailing party" this way. See, *e.g.*, *Saint John's Organic Farm* v. *Gem Cty. Mosquito Abatement Dist.*, 574 F.3d 1054, 1063-64 (9th Cir. 2009); *King* v. *Ill. State Bd. of Elections*, 410 F.3d 404, 424 (7th Cir. 2005)

b. The Express Terms of the WPPDA Limited Fees to "Plaintiffs," and Congress Intended To Allow Both Plaintiffs and Defendants To Recover Fees

Under the WPPDA, only "plaintiffs" were eligible to receive attorney's fees. The clearest difference between the WPPDA and §502(g)(1) is that the latter eliminated "plaintiffs" and allowed fee awards "to either party." That was not the first time Congress adopted that precise formulation.

At the time of ERISA's enactment, two other economic statutes likewise permitted courts to exercise "discretion" to award fees to "either party," using language virtually identical to that adopted in ERISA. See Securities Exchange Act of 1934, 15 U.S.C.A. §§78i(e), 78r(a); Trust Indenture Act, 15 U.S.C.A. §77www(a) ("In any such suit the court may, *in its discretion*, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, *against either party* litigant.") (emphasis added).

Given their virtually identical language, there is a strong presumption that ERISA and these prior statutes should be interpreted the same way. See *Northcross*, 412 U.S., at 428 ("similarity of language" between statutes "is a strong indication that that the two statutes should be interpreted in *pari passu*").

And, although ERISA's legislative history is silent on why Congress chose to enact §502(g)(1), there

is considerable legislative history explaining Congress's decision to adopt the 1934 Act's nearly identical statutory text:

> Protection against strike suits is provided by giving the court authority in its discretion to assess costs, including attorney's fees, against either party and even to require an undertaking for the payment thereof.

S. Rep. No. 73-792, at 21 (1934).[8]

Congress's use of the same language in §502(g)(1) —"discretion" to award fees to "either party"—suggests that Congress's intent was also similar. Both ERISA and the 1934 Act regulate "economic interests," *Eddy* v. *Colonial Life Ins. Co. of N. Am.*, 59 F.3d 201, 204-05 (D.C. Cir. 1995), and the legislative history of the 1934 Act suggests that a significant purpose of Congress in adopting §502(g)(1), like the 1934 Act, was to prevent strike suits and ensure that defendants, as well as plaintiffs, could receive attorney's fees.

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[8] The Senate Report further provided, "to give protection against 'strike' suits, or litigation brought in bad faith, the court is authorized to assess reasonable costs, including attorney's fees against either party to the suit * * * * *") *Id*, at 18. Courts, in turn, have relied on this legislative intent in determining whether to award fees. See, *e.g.*, *Nemeroff* v. *Abelson*, 620 F.2d 339, 349-50 (2d Cir. 1980); *S.E.C.* v. *Wilson*, Civil Action No. 04-cv-1331 (JCH), 2009 WL 2381954, at * 4 (D. Conn. July 31, 2009).

c. When ERISA Was Enacted, "Prevailing Party" Statutes Had Also Been Read Restrictively To Require Essentially Complete Success on the Merits

At the time of ERISA's enactment in 1974, "the 'prevailing party' standard had been interpreted in a variety of rather narrow ways." *Ruckelshaus*, 463 U.S., at 687-88. Some courts had interpreted "prevailing party" restrictively to allow a fee award only if the party had achieved complete success on essentially *all* the claims, and thus precluding any recovery of fees for even a significant partial success. *Ibid.*

As *Ruckelshaus* concluded, the "quite sensible" interpretation of Congress's intent in not using the phrase "prevailing party" is that Congress wanted "to eliminate both the restrictive readings of 'prevailing party' * * * and the necessity for case-by-case scrutiny by federal courts into whether plaintiffs prevailed 'essentially' on 'central issues.'" *Id.*, at 688. That is, the absence of an express "success" requirement "modifies but does not completely reject the traditional rule that a fee claimant must 'prevail' before it may recover attorney's fees." *Id.*, at 686. It "expand[s] the class of parties eligible for fee awards from prevailing parties to *partially prevailing* parties * * * * " *Ibid.*

3. The Congressional Purpose Behind ERISA Is Altogether Consistent with the *Ruckelshaus* Requirement of "Some Success on the Merits"

Under the clear-statement requirement of *Ruckelshaus*, it is not certain that legislative history could ever constitute a sufficiently clear statement to adopt a more expansive rule than the modified prevailing party standard. The text of §502(g)(1), like the text of the Clean Air Act, has no such clear statement. In any event, there is nothing in ERISA's legislative history that points in the direction of a more expansive rule.

Both Petitioner and the Solicitor General focus nearly exclusively on one of ERISA's main purposes: "to protect * * * the interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. §1001(b). However, this was not Congress's sole purpose. Rather, "the detailed provisions of §502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures *against the public interest in encouraging the formation of employee benefit plans*." *Pilot Life Ins. Co.* v. *Dedeux*, 481 U.S. 41, 54 (1987) (emphasis added). "The *limited remedies* available under ERISA are an inherent part of the 'careful balancing' between ensuring fair and prompt enforcement of rights under a plan *and the encouragement of the creation of such plans*." *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 215 (2004) (emphasis added); see also *Metro.*

Life Ins. Co. v. *Glenn*, 128 S. Ct. 2343, 2353 (2008) (Roberts, C.J., concurring in part and concurring in the judgment).

As the Court has observed, ERISA's legislative history reflects that "Congress was concerned lest the cost of federal standards discourage the growth of private pension plans." *Mass. Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 148 n.17 (1985) (citing H.R. Rep. No. 93-533, at 9 (1973); 120 Cong. Rec. 29210-11 (1974); 120 Cong. Rec. 29949 (1974)). And nothing in that more general history of ERISA suggests that Congress intended to adopt a particularly expansive attorney's fees provision. See, *e.g.*, 120 Cong. Rec. 29949 (1974) (statement of Mr. Bentsen) (although "[t]he purpose of this legislation is * * * to set up minimum standards to prevent real abuses * * * [,] it is important to recognize that if minimum standards are set too high, we would discourage the creation of new plans.").[9]

[9] Petitioner cites statements from industry and public interest groups concerning suggested changes to the fee-shifting provision. See Pet. Br. 21 & n.3. That Congress did not adopt a particular suggestion does not reasonably suggest it rejected such suggestions, particularly where no legislative history exists to suggest why Congress might not have adopted a suggestion.

4. ERISA's 1980 Amendments Are Altogether Consistent with the *Ruckelshaus* Requirement of "Some Success on the Merits"

The final important piece of ERISA's structure and history is the 1980 amendments to §502(g), which created two separately numbered subparagraphs, §502(g)(1) and §502(g)(2). Pub. L. No. 96-364, §104(2), 94 Stat. 1208, 1263 (1980), as codified at 29 U.S.C. §1451(e). ERISA's original fee-shifting provision, which was recodified in 1980 as subparagraph (1) of §502(g), continued to govern all actions other than suits under subparagraph (2), which involve claims to recover delinquent contributions to multiemployer plans. Specifically, Congress added §502(g)(2) to address the concern that "[d]elinquencies of employers in making required contributions are a serious problem for most multiemployer plans." Senate Comm. on Labor & Human Resources, 96th Cong., 2d Sess., S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 43 (Comm. Print 1980).

Unlike the original §502(g), the amendments in §502(g)(2) "include[ ] a *mandatory award* of prejudgment interest plus liquidated damages in an amount at least equal to that interest, *as well as attorney's fees* and costs." *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539, 547 (1988). Thus, §502(g)(2) provides that "[i]n any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 in which a judgment

in favor of the plan is awarded the court *shall* award the plan: * * * (D) reasonable attorney's fees and costs of the action, to be paid by the defendant." 29 U.S.C. §1132(g)(2) (emphasis added).

Petitioner contends that, because §502(g)(2) uses the word "judgment" and §502(g)(1) does not, attorney's fees under §502(g)(1) must therefore not require a judgment reflecting any success on the merits. However, nothing in the amendment of §502(g) suggests any intent to alter the original content of §502(g)(1), and any such inference is directly contrary to the holding of *Ruckelshaus* that, in the absence of a clear statement to the contrary, a claimant must demonstrate "some success *on the merits*." 463 U.S., at 693. Moreover, there is a far more reasonable explanation for including "judgment" in §502(g)(2)—it was necessary for the remainder of that section to make sense.

Section 502(g)(2), unlike its statutory sibling which addresses only a discretionary award of fees, addresses a range of matters beyond attorney's fees. Consistent with its narrow purpose to ensure that employer contributions are properly made to multiemployer plans, it *requires* the district court, upon a determination that an employer owes money to the plan, to award the unpaid contributions *and also* interest, liquidated damages, and attorney's fees and costs. 29 U.S.C. §1132(g)(2). Given these mandatory remedies, it would have been difficult, if not impossible, for Congress to have drafted the detailed provisions in §502(g)(2) without expressly requiring a

judgment in the plan's favor.[10] These "strict remedies" reflect Congress's intent "to give employers a strong incentive to honor their contractual obligations to contribute and to facilitate the collection of delinquent accounts." *Laborer's*, 484 U.S., at 547. Section 502(g)(1), in contrast, contains no such mandatory "strict remedy."[11]

C. Reading Section 502(g)(1) To Allow a Non-Prevailing Party To Recover Fees Would Necessarily Affect Many Other Attorney's Fees Statutes

Congress has enacted over 200 statutes providing for the award of attorney's fees. See generally Appendix A (collecting federal statutes). The wording of

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[10] For example, interest on unpaid contributions can only be payable to the plan upon a determination that contributions have been unpaid. And it would be nonsensical to award liquidated damages without first rendering a judgment that an employer failed to properly make required contributions.

[11] There is likewise no merit in Petitioner's arguments that Congress intended to allow fee awards under §502(g)(1) for non-prevailing parties because the 1986 amendments to ERISA added a fee-shifting provision for claims related to single-employer plans where a party "prevails or substantially prevails." 29 U.S.C §1370(c)(1); see also 29 U.S.C. §1451(e). These distinct provisions—in different parts of ERISA and enacted at different times—cannot constitute the required clear statement of Congress to abrogate the requirement that a party achieve at least some success on the merits. See *Mackey* v *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 840 (1988) ("'The views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'").

these fee-shifting provisions is far from uniform. Nonetheless, they can be broadly categorized into three groups. In some provisions, the award of counsel fees is mandatory. See, *e.g.*, Appendix A, at 1-47. Many other provisions allow courts or agencies discretion to award fees to "prevailing parties," "substantially prevailing" parties, or "successful" parties.[12] See, *e.g.*, Appendix A, at 47-73.

Additionally, at least 40 fee-shifting provisions, like §502(g)(1), neither expressly require success nor expressly disclaim any requirement of success. See Appendix A, at 74-88; see also *Ruckelshaus*, 463 U.S., at 682-83 n.1 (noting sixteen statutes that fell within the "whenever appropriate category"). If the Court were to interpret §502(g)(1) to allow non-prevailing parties to recover fees, that would necessarily affect those other statutes—including the provision of the Clean Air Act at issue in *Ruckelshaus*.

Indeed, it would be difficult to adopt the broad rule urged by Petitioner without overruling *Ruckelshaus*, an outcome for which Petitioner and her *amici* have made no compelling case.

Moreover, since many of these statutes apply also to litigation against the government, any interpretation that allowed non-prevailing parties to recover

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[12] Courts have generally deemed "inconsequential" the difference between "prevailing" and "substantially prevailing." See *Loggerhead Turtle* v. *County Council of Volusia County, Fla* , 307 F.3d 1318, 1322 n.4 (11th Cir 2002); see also *Buckhannon*, 532 U.S., at 603.

their fees would have a significant impact on the public fisc. For that reason, the position urged by the Solicitor General is quite remarkable. Historically, the United States has vigorously defended the public fisc, and has fiercely resisted efforts to allow attorney's fees to be paid to those who have not first prevailed on the merits.[13]

With no explanation, the United States appears to have abandoned that long-held position. And, its new position is not consistent with this Court's precedent.

The legal rule that governs this case derives from the square holding of *Ruckelshaus*: Congress has not expressly provided that non-prevailing parties can recover fees. Therefore, under the clear statement rule, they cannot. Instead, a modified prevailing party standard obtains. Under this standard, to be eligible to recover fees under §502(g)(1), a litigant must achieve at least "some success on the merits." Absent success *on the merits*, there can be no award of attorney's fees.

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[13] See, *e.g.*, *Sole* v. *Wyner*, 551 U.S. 74 (2007) (No 06-531) Brief for the United States as *Amicus Curiae* Supporting Petitioners at 9-10; *Indep. Fed'n of Flight Attendants* v. *Zipes*, 109 S. Ct. 2732 (1989) (No. 88-608) Brief for the United States and the Equal Employment Opportunity Commission as *Amicus Curiae* Supporting Petitioner at 18.

II. PETITIONER'S PURELY PROCEDURAL VICTORY, A "REMAND" FOR A NEW DETERMINATION OF DISABILITY, IS NOT "SOME SUCCESS ON THE MERITS" AND CANNOT SUPPORT AN AWARD OF ATTORNEY'S FEES UNDER §502(g)(1)

Although Petitioner and the Solicitor General both agree that §502(g)(1) is "analogous" to the statute in *Ruckelshaus*, and concede that *Ruckelshaus* should govern this case, Pet. Br. 38-39; U.S. Br. 20, they both fail to confront the central holding of *Ruckelshaus*: that "some degree of success *on the merits*" is required before attorney's fees can be awarded.

Parsing that holding requires analysis of both the *quantum* of success required (at least "some degree") and the *nature* of the success required ("on the merits"). As to the former, *Ruckelshaus* concluded that the omission of words like "prevail" and "success" decreases the *quantum* of success required. Absent such words, "fees may be awarded to all parties who *prevail in part* as well as those who *prevail in full* * * * " 463 U.S., at 689.

But with respect to the latter, *Ruckelshaus* concluded that the absence of "prevail" or "success" does not change the *nature* of the success required. The contrast above between "in full" and "in part" is a contrast in quantity. But the basic *type* of success required remains the same: to fall within the statute, it must be success "on the merits."

Success "on the merits" connotes substantive judicial relief, which the *Ruckelshaus* Court explicitly contrasted with "purely procedural" victories:

> Of course, we *do not mean to suggest* that trivial success on the merits, or *purely procedural victories*, would justify an award of fees under statutes setting out the when "appropriate" standard.

Id., at 688 n.9 (emphases added).

The legal distinction between substantive and procedural rulings is, of course, longstanding. And, by any measure, the district court's "remand" to Reliance fell on the "procedural" side of the line.

A. An ERISA "Remand" to a Private Claims Administrator, Even When Followed by a Decision by the Administrator To Award Benefits, Is Procedural in Nature and So Does Not Permit an Award of Attorney's Fees

If the judicial "remand" to Reliance constituted "some success on the merits," then Ms. Hardt would be eligible for attorney's fees under ERISA; if, on the other hand, it was a "purely procedural victory," then she is not.

1. ERISA "Remands" Are Purely Procedural and Entail No Substantive Relief

In ordinary usage, the term "remand" is understood to mean that one judicial tribunal is sending a matter back to an inferior judicial tribunal. See BLACK'S LAW DICTIONARY 1319 (8th ed. 2004) (defining "remand" as: "[t]o send (a case or claim) *back to the court or tribunal from which it came* for some *further* action.") (emphasis added); *Etape* v. *Chertoff*, 497 F.3d 379, 384 (4th Cir. 2007) ("When a court remands a case, it sends the case back to the place from which it came for purposes of having some further action taken in the tribunal of origin." (internal citations omitted)). A secondary usage is that a judicial tribunal is sending a matter back to an executive agency for reconsideration. In both cases, the remand is to a governmental decisionmaker, and a remand for purely procedural reasons is by definition not substantive.

The Court addressed just such a scenario in *Hanrahan* v. *Hampton*, 446 U.S. 754 (1980). There, in civil-rights litigation, the district court had entered a directed verdict for the defendants. The court of appeals reversed and remanded, holding that plaintiffs were entitled to a jury trial. Finding that plaintiffs were therefore a "prevailing party," the court of appeals awarded attorney's fees. This Court reversed:

> The respondents have of course *not prevailed on the merits of any of their claims*. The Court of Appeals held only that the respondents were entitled to a trial of their cause.

> As a practical matter, they are in a position no different from that they would have occupied if they had simply defeated the defendants' motion for a directed verdict in the trial court. The jury may or may not decide some or all of the issues in favor of the respondents. If the jury should not do so on remand in these cases, it could not seriously be contended that the respondents had prevailed. Nor may they fairly be said to have "prevailed" by reason of the Court of Appeals' other interlocutory dispositions, which affected only the extent of discovery. *As is true of other procedural or evidentiary rulings*, these determinations may affect the disposition on the merits, but were themselves not matters on which a party could "prevail" for purposes of shifting his counsel fees to the opposing party under §1988.

Id., at 758-59 (emphasis added and citations omitted).

Thus, because the remand was procedural, rather than relief on the merits, the Court concluded that attorney's fees could not be awarded. To be sure, the statute at issue included an express "prevailing party" requirement, but, as the Court held in *Ruckelshaus*, that changed only the *quantum* of success required, not the *nature* of the success—regardless, it must be

on the merits, and a judicial remand for new trial (irrespective of the outcome of that trial) is not.[14]

And if that is true as to a judicial remand to another judicial tribunal, *a fortiori* it is true with respect to an ERISA "remand" to a private party who is under no obligation to reach a different substantive decision. Indeed, in the ERISA context, the word "remand" is a misnomer. (For that reason, presumably, the Solicitor General puts quotes around the word throughout her brief.) Here, the district court did not remand the case to any judicial tribunal, or even to any other governmental body. Instead, the court "remanded" the case back to a private party, to reconsider the matter and decide, in its discretion, whether Ms. Hardt's condition satisfied the terms of the plan.

Although ERISA is a "highly reticulated" statute, *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 108 (1989), it contains no provision expressly allowing a district court to "remand" to a claims administrator. Nevertheless, and in recognition of the administrator's broad discretion to make determinations of benefits under ERISA plans, the circuit

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[14] Likewise, in the agency context, the D.C. Circuit has held that a remand to an agency for a violation of the Administrative Procedures Act for failure to adequately respond to comments in a rulemaking is a "purely procedural victory" which does not permit an award of attorney's fees under a provision allowing for fees "whenever [the court] determines that such award is appropriate." *Appalachian Power Co.* v. *EPA*, 320 F.3d 280 (D.C. Cir. 2003).

courts have uniformly recognized the propriety of these quasi-"remands" for purely procedural violations. In this procedure, the district courts often retain jurisdiction, so the "remand" order itself is interlocutory and unappealable. See, *e.g.*, *Bowers*, 365 F.3d at 537. Such "remand" orders are intended to allow ERISA claims administrators to exercise their discretion in the first instance.[15] As the Fourth Circuit explained,

> [i]f the court believed the administrator lacked adequate evidence, the proper course was to "remand to the trustees for a new determination," not to bring additional evidence before the district court. To review *de novo* all the evidence trustees *might* have considered is to transfer the administration of benefit and pension plans from their designated fiduciaries to the federal bench. Such substitution of authority is plainly what the formulated standards in this field are intended to prevent.

Berry v. *Ciba-Geigy Corp.*, 761 F.2d 1003, 1007 (4th Cir. 1985) (emphasis added; citations omitted).

It is now a well-established "general principle" that "an employer's or plan's failure to comply with ERISA's procedural requirements *does not entitle a*

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[15] See, *e.g.*, *LaFleur* v. *La. Health Serv & Indem Co.*, 563 F.3d 148, 157 (5th Cir. 2009); *Cooper* v *Life Ins Co. of N. Am.*, 486 F.3d 157, 171 (6th Cir. 2007); *Majeski* v. *Metro. Life Ins. Co.*, 590 F.3d 478, 484 (7th Cir. 2009).

claimant to a substantive remedy." *Ashenbough* v. *Crucible, Inc.*, 854 F.2d 1516, 1532 (3d Cir. 1988) (emphasis added). Accordingly, the "remand" reflects the fact that "the validity of a claim to benefits under an ERISA plan is likely to turn on the interpretation of terms in the plan at issue," *Firestone*, 489 U.S., at 115. And that post-"remand" determination is generally reviewed under an abuse of discretion standard. *Metropolitan Life*, 128 S. Ct., at 2350.[16]

As the Chief Justice has noted, "[e]nsuring that reviewing courts respect the discretionary authority conferred on ERISA fiduciaries *encourages employers to provide medical and retirement benefits to their employees through ERISA-governed plans—something they are not required to do*." *Id.*, at 2353 (Roberts, C.J., concurring in part and concurring in the judgment) (emphasis added); see also, *e.g.*, *Saffle* v. *Sierra Pac. Power Co. Bargaining Unit*, 85 F.3d 455, 461 (9th Cir. 1996) ("It is not the court's function *ab initio* to apply the correct standard to [the participant's]

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[16] The standard of review of an administrator's decision whether to award benefits is based primarily on two factors. The first is whether the plan "grant[s] 'the administrator or fiduciary *discretionary authority* to determine eligibility for benefits.'" *Metropolitan Life*, 128 S. Ct., at 2348 (quoting *Firestone*, 489 U.S., at 115). Following *Firestone*, virtually all plans provide such discretionary authority. *Id.*, at 2350. If so, an abuse of discretion standard is appropriate. *Ibid.* Second, if the administrator is operating under a conflict of interest—because, for example, it both funds the plan and evaluates claims—courts must apply a modified abuse of discretion review which takes the conflict into account. *Id.*, at 2350.

claim. That function, under the Plan, is reserved to the Plan administrator.").

Here, the district court was clear that it was making a procedural, not a substantive decision. Thus, the court denied both parties' cross-motions for summary judgment and made no substantive determination that petitioner was disabled.[17] Instead, it held that "Ms. Hardt did not get the kind of review to which she was entitled" because certain evidence was "incomplete" or "outdated," and other evidence had not been considered adequately. Pet.App. 47a. "For this reason," the court "remanded" the case "to Reliance to fully and adequately assess Ms. Hardt's claim." Pet.App. 48a.

Thus, the district court left the ultimate determination in Reliance's full discretion. Despite Petitioner's suggestions to the contrary, the court did not "instruct" or "direct" Reliance to rule on her claim in any particular way; rather, it remanded for reconsideration. Pet. Br. 1, 15; Pet.App. 49a. Indeed, the district court observed: "[h]ad the defendant completed its review [on "remand"] in the manner ordered by the court and in the prescribed time period, and again

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[17] That is not to say that a district court may never grant substantive relief under ERISA. However, "[a] substantive remedy would be appropriate only if the procedural defects caused a substantive violation or themselves worked a substantive harm." *Ellenburg* v. *Brockway, Inc.*, 763 F.2d 1091, 1096 (9th Cir. 1985). In such situations, a claimant has succeeded *on the merits* of her claim and could therefore be eligible for fees.

determined that the plaintiff was *not* eligible for benefits, it is certainly possible that the court would have found the result *satisfactory*." Pet.App. 20a n.5 (emphases added).

In this respect, the district court's decision was much like the court of appeals' decision in *Hanrahan*. There, as here, the court expressly observed that it "was 'not passing on the ultimate validity of [the respondents'] claims.'" 446 U.S., at 758 n.5. And there, as here, the remand for a new determination (whether by a jury or by Reliance), was therefore procedural, and not substantive.

B. The Ultimate Grant of Benefits by the Claims Administrator Cannot Transform a Purely Procedural Victory into Success on the Merits

It is beyond serious dispute that a "remand" followed by a complete denial of benefits could not fairly be characterized as a victory "on the merits." No doubt recognizing that, Petitioner proposes a hybrid: although a remand alone might not be enough, the "remand" *plus* the administrator's decision to award benefits, together constitute victory "on the merits." Pet. Br. 45-50. That hybrid theory does not withstand scrutiny.

Judicial decisions are either procedural or substantive, and that characteristic is fixed. If a judicial "remand" *simpliciter* is purely procedural (and it is), then subsequent conduct by a private party

cannot somehow "transform" that procedural decision into a substantive decision. Put another way, if a "remand" followed by a denial is not substantive, than neither is a "remand" followed by a grant of benefits. In both cases, the *judicial* relief was purely procedural—an order for the private party to reconsider the matter. And it cannot be that subsequent conduct, by a private party interpreting a private contract, can alter the character of that prior judicial action.[18]

This is underscored by two critical aspects of this particular case. *First*, the initial decision of the district court, finding procedural violations of ERISA in the manner in which Reliance evaluated the evidence, has never been subject to appellate review, and never will be.[19] Indeed, Reliance could have challenged that interlocutory, procedural decision only by denying benefits again on "remand"; had the district court then addressed the merits, and entered a substantive determination (either ordering benefits or agreeing with their denial), then the propriety of the remand could conceivably have been considered on appeal.

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[18] Nor can the administrator's decision itself constitute the requisite "success on the merits." Any decision to award benefits on "remand" is a voluntary decision by a private party, pursuant to the terms of an ERISA plan, not a grant of substantive relief from the court, and thus cannot constitute success "on the merits" to which a right to attorney's fees could attach under *Ruckelshaus*.

[19] See *supra*, at 5 & n.1

Second, on "remand" Petitioner introduced substantial new evidence, see *supra* at 6-7, and based on the full record, including the new evidence, Reliance determined that she was disabled. Thus, it is entirely possible that *both of Reliance's disability determinations were substantively correct*. To wit, it could well be that, based on the initial record (which was limited by Ms. Hardt's repeated refusal to cooperate with the medical evaluations), the determination was entirely correct that she was not fully disabled at that time;[20] likewise, it could be that, based on the expanded record (which included a new medical evaluation and MRI), the determination on "remand" that she was then fully disabled was also correct.

By analogy to judicial remand, if, in *Hanrahan*, the plaintiffs on remand had introduced substantial new evidence in support of their claims, it is possible that the jury might have ultimately found in their favor, based on that new evidence. That then would have been a determination on the merits[21]—but it

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[20] As the district court noted, "judicial review * * * is limited to the body of evidence before the administrator at the time it rejected [the] claim." Pet.App 40a (quoting *Donnell* v. *Metro Life Ins. Co.*, 165 Fed. Appx. 288, 294 (4th Cir. 2006)).

[21] And, as a *judicial* determination on the merits, it would have independently rendered plaintiffs eligible for attorney's fees. Here, Reliance's determination that benefits were due was not a judicial determination, and nothing in ERISA provides for attorney's fees simply because the administrator determines that benefits should be awarded—especially given that "benefits under an ERISA plan [are] likely to turn on the interpretation of terms in the plan at issue," *Firestone*, 489 U.S., at 115.

would not have retroactively transformed the prior, procedural remand into a decision on the merits. As this Court held, the remand was a procedural decision, and procedural decisions cannot give rise to an award of attorney's fees.

C. Success on the Merits Must Be Measured by the Content of the Judgment

An ERISA "remand" is not substantive for another, more fundamental reason. Success "on the merits" is, by definition, success reflected *in a judgment*. See BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "on the merits" as "(*Of a judgment*) delivered after the court has heard and evaluated the evidence and the parties' substantive arguments.") (emphasis added).

This requirement of success reflected in the judgment was *Buckhannon*'s primary focus. In *Buckhannon*, the Court repeatedly emphasized that "[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary *judicial imprimatur* on the change." 532 U.S., at 605; see also *id.*, at 605-06 ("We have not awarded attorney's fees where the plaintiff has * * * acquired a judicial *pronouncement* that the defendant has violated the Constitution unaccompanied by judicial *relief*. Never have we awarded attorney's fees for a *nonjudicial* alteration of actual circumstances.") (emphasis added).

Admittedly, the statute at issue in *Buckhannon* included the words "prevailing party," and §502(g)(1) does not. But again, *Ruckelshaus* explains that the absence of the words "prevailing party" changes the *quantum* of success required, but not the *nature* of the success required. Whether it is necessary to "prevail in part" (per a *Ruckelshaus*-type statute like §502(g)(1)) or "prevail in full" (per a *Buckhannon*-type statute), *Buckhannon* teaches that one measures "prevailing" by examining, not "judicial pronouncements," *id.*, at 605, and not "nonjudicial 'alteration of actual circumstances,'" *id.*, at 606, but ultimate judicial judgments.

Thus, *Buckhannon* emphasizes that "a settlement agreement enforced through a consent decree may serve as the basis of an award of attorney's fees," *id.*, at 604, but the identical settlement agreement without a consent decree cannot. *Id.*, at 604 n.7. The reason is straightforward: "Private settlements do not entail the judicial approval and oversight involved in a consent decree." *Ibid.*

Likewise, Petitioner's claim that the district court's "remand" influenced the administrator's decision through some intangible persuasion is the precise argument the Court rejected in *Buckhannon* —that fees can be awarded based on the "catalyst theory." 532 U.S., at 605 (emphasis added) ("voluntary change in conduct" cannot support fees). Justice Scalia's concurrence is even more to the point: "[a]t the time 42 U.S.C. §1988 was enacted [in 1976], I know of *no case*, state or federal, in which—either

under a statutory invocation of 'prevailing party' or under the common-law rule—the 'catalyst theory' was enunciated as the basis for awarding costs." *Id.*, at 611 (emphasis added).

And if there were any doubt remaining that a judgment is required, it is dispelled by FED. R. CIV. P. 54(d)(2)(B). That Rule provides:

> "Unless a statute or a court order provides otherwise, [a] motion [for attorneys fees] must: * * * (ii) *specify the judgment* and the statute, rule, or other grounds *entitling the movant to the award.*"

Rule 54(d)(2)(B) applies in ERISA cases, because §502(g)(1) does not "provide otherwise"; §502(g)(1) empowers "the court in its discretion" to allow attorney's fees, but it does not provide rules governing the "timing and contents of the motion" for attorney's fees that would preempt the rule of Rule 54(d)(2). See, *e.g., Bittner* v. *Sadoff & Rudoy Indus.*, 728 F.2d 820, 828 (7th Cir. 1984) (concluding that "an attorney's fee award under section [502](g)(1) should be sought * * * by filing a motion under Rule 54(d)"). And under Rule 54(d), it is the *judgment*—not interlocutory orders, procedural victories, or extra-judicial developments—that can "entitle the movant to the award." FED. R. CIV. P. 54(d)(2)(B)(ii).

D. The Judgment in this Case Does Not Constitute Success on the Merits and so Cannot Support an Award of Attorney's Fees

In its final Opinion and Order of August 7, 2008, the District Court disposed of the case with these words: "[T]he court finds that the plaintiff is entitled to an award of attorneys' fees and costs and therefore that her motion is GRANTED * * * * It appearing to the court that no further legal issues remain to be resolved in this matter, the case is DISMISSED." Pet.App. 30a.

By definition, such a dismissal cannot constitute success on the merits for the plaintiff. This logical proposition is confirmed by Rule 41 of the Federal Rules of Civil Procedure, which provides:

> Unless the dismissal order states otherwise, a dismissal under this subdivision (b) *and any dismissal not under this rule—except one for lack of jurisdiction*, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

FED. R. CIV. P. 41(b) (emphasis added). Although the district court did not specify the type of dismissal, it was presumably a dismissal on mootness grounds, which is jurisdictional and therefore under Rule 41(b) does *not* "operat[e] as an adjudication on the merits." See *A.P. Boyd, Inc.* v. *Newark Pub. Schs.*, 44 Fed. Appx. 569, 573 (3d Cir. 2002) ("For Appellants to be prevailing parties and thus entitled to attorneys' fees

under 42 U.S.C. §1988(b), they must have either obtained a judgment on the merits or be a party to a settlement agreement that is expressly enforced by the court through a consent decree. Neither has occurred here. First, as previously discussed, they have not prevailed on the merits because their claims were dismissed as moot."); *Fla. Pub. Interest Research Group Citizen Lobby, Inc.* v. *EPA*, 386 F.3d 1070, 1086 (11th Cir. 2004) ("mootness is jurisdictional"). Moreover, even if the district court's order dismissing the case was not jurisdictional, such that dismissal would "operate[ ] as an adjudication on the merits," that would not help Petitioner. If a dismissal "operates as an adjudication on the merits," then it "operates as an adjudication on the merits" *in favor of the defendant*. See, *e.g.*, *District of Columbia* v. *Straus*, 590 F.3d 898 (D.C. Cir. 2010).

Likewise, Petitioner lacks the necessary predicate for attorney's fees under Rule 54(d)(2)(B): a "*judgment* * * * entitling [Petitioner] to the award." And this is no mere technical failing; it underscores the central flaw in Petitioner's theory of the case. The Court's cases require—and Rule 54(d)(2)(B) underscores—that success on the merits is measured by examining, not "judicial pronouncements" and not

"nonjudicial alteration of actual circumstances," but ultimate judicial judgments.[22]

In short, the final judgment, "DISMISSED," cannot constitute "success on the merits" for Ms. Hardt.

E. The Rule Petitioner Advocates Runs Afoul of the Court's Determination That Fee Shifting Should Not Lead to "a Second Major Litigation" and Would Have Serious Negative Implications For ERISA

Not only is Petitioner's claim contrary to the holdings in both *Ruckelshaus* and *Buckhannon*, its focus on the administrator's subjective rationale for awarding benefits on "remand" would predictably create, as it did here, "a second major litigation":

> We have also stated that "[a] request for attorney's fees should not result in a second major litigation," and have accordingly avoided an interpretation of the fee-shifting statutes that would have "spawn[ed] a second litigation of significant dimension." Among other things, a "catalyst theory" hearing would require analysis of the defendant's subjective motivations in changing its conduct, an analysis that "will likely depend on a highly factbound inquiry and may turn on

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[22] Courts frequently deny fee requests for failure to comply with Rule 54(d). See, *e g.*, *Bender* v. *Freed*, 436 F.3d 747, 750 (7th Cir 2006).

> reasonable inferences from the nature and timing of the defendant's change in conduct."

Buckhannon, 532 U.S., at 609-10; see also, *e.g.*, *Ruckelshaus*, 463 U.S., at 688 n.9, 694.

Moreover, Petitioner's theory would have additional policy implications. Given the broad discretion of claims administrators, a decision by this Court that awarding benefits upon "remand" triggers attorney's fees could make administrators think twice before awarding benefits in a close case. Such a rule would also be contrary to both purposes of ERISA. First, it would make plans more costly to administer, thus discouraging the creation of generous plans and increasing the costs of plans to plan participants. See, *e.g.*, *Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996). Second, it could create an incentive for administrators to *deny* the awarding of benefits on "remand," a decision the district court might be powerless to change given the deferential standard of review the court must apply. See, *e.g.*, *Buckhannon*, 532 U.S., at 608 (noting "the disincentive that the 'catalyst theory' may have upon a defendant's decision to voluntarily change its conduct, conduct that may not be illegal"); see also *Evans* v. *Jeff D.*, 475 U.S. 717, 734 n.23 (1986).[23]

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[23] Indeed, under the most aggressive rule advocated by both the Petitioner and the Solicitor General, that a claimant is entitled to fees regardless of the outcome of an ERISA "remand," Pet. Br. 41, U.S. Br. 27, the claimant could receive no additional

(Continued on following page)

Petitioner and the Solicitor General complain that denying a claimant the opportunity to seek fees where benefits are awarded on "remand" will allow claims administrators to deny meritorious claims, oppose the claim in a federal action, and "yet insulate themselves from any award of attorney's fees," thus giving plan administrators "an incentive" to deny claims. U.S. Br. 31. The short answer to this concern is that had Congress intended to tilt the scale so far in favor of the claimant, it easily could have done so expressly.[24] But Congress did not, which suggests an intent to retain the traditional balance in ERISA.

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benefits but her attorney, as a result of a purely "procedural" victory, could receive a substantial award.

[24] As Justice Scalia observed in his concurrence in *Buckhannon*, 532 U.S., at 619:

> Since the fee-shifting statutes at issue here allow defendants as well as plaintiffs to receive a fee award, we know that Congress did not intend to maximize the quantity of 'the enforcement of federal law by private attorneys general,' * * * * Rather, Congress desired an appropriate level of enforcement—which is more likely to be produced by limiting fee awards to plaintiffs who prevail 'on the merits,' or at least to those who achieve an enforceable 'alteration of the legal relationship of the parties,' than by permitting the open-ended inquiry [allowed by the catalyst theory].

F. Fee Awards in Social Security Act Remands to a Federal Administrative Agency Are Not an Appropriate Analogy for ERISA "Remands" to a Private Claims Administrator

Petitioner and the Solicitor General urge the Court to "analogize" to the Court's cases involving fee awards for remands under the Social Security Act ("SSA"). Pet. Br. 41. Petitioner claims these cases "held that a remand to an administrative agency confers 'prevailing party' status in analogous situations arising under the [SSA], which uses the 'prevailing party' standard for determining fees under the Equal Access to Judgment Act," 28 U.S.C. §2412 ("EAJA"). *Ibid.* Petitioner argues that these holdings should be adopted here to establish that "Hardt is a 'prevailing party' * * * based solely on the remand order," and that "in ERISA cases, the remand alone provides the judicial imprimatur required by *Buckhannon* for fee awards under 'prevailing party' statutes." *Id.*, at 44. Petitioner's efforts to analogize to the SSA remands fail for several reasons.

First, the Court has repeatedly cautioned against using the SSA program as a model for ERISA. See, *e.g.*, *Metropolitan Life*, 128 S. Ct., at 2353-54 (Roberts, C.J., concurring) (the Court has "rejected this analogy" between judicial review of "agency determinations" and "ERISA benefits decisions"). As the Court held in *Black & Decker Disability Plan* v. *Nord*, 538 U.S. 822, 832-33 (2003), in rejecting application of the SSA's treating-physician rule to ERISA plans, there

are "critical differences between the Social Security disability program and ERISA benefit plans" that "caution against" importing a rule from one system into the other.

Under the SSA's statute and regulatory scheme, to determine eligibility for Social Security benefits, a federal ALJ measures the claimant's condition against a "uniform set of federal criteria" that have been adopted "to foster uniformity and regularity in Social Security benefits determinations." *Ibid.*; see also 42 U.S.C. §§401-433; 20 C.F.R. §§404.1-.2127, 416.101-.2227. The "detailed regulations" governing this federal program include a five-step procedure the ALJ must follow to evaluate whether a claimant is "disabled," see 20 C.F.R. §404.1520, 416.920, as well as "grids" that provide specific guidance about how the ALJ must weigh certain factors in determining whether a claimant is disabled. See 20 C.F.R. §404, Subpart P, Appendix 1-2; 42 U.S.C. §423(d)(3)(A).

In contrast, virtually every aspect of ERISA reflects the absence of statutory, regulatory, or judicial controls of disability determinations. Unlike the SSA's mandatory disability program, nothing in ERISA "mandate[s] what kind of benefits employers must provide if they choose to have such a plan"; instead, "employers have large leeway to design disability and other welfare plans as they see fit." *Cleveland* v. *Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 803 (1999) (quoting *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 887 (1996)). Unlike the SSA, whose decisionmakers are

federal administrative agencies, ERISA provides that disability determinations are made by private entities administering voluntarily adopted plans. Thus, unlike the SSA's closely circumscribed control over ALJs' disability determinations, ERISA imposes virtually no legislative or regulatory guidelines for a claims administrator's discretionary determination of disability.

Second, SSA remands produce judgments. The SSA provides two statutory provisions for remand. Under what is known as a "sentence-four" remand, "a district court shall have the power * * * to enter *judgment* * * * with or without *remanding* the cause for a hearing." 42 U.S.C. §405(g) (emphasis added). As the Court made clear in *Shalala* v. *Schaefer*, 509 U.S. 292, 297-98 (1993), the "principal feature" of a sentence-four remand is the "[i]mmediate entry of *judgment*." (Emphasis added). Thus, unlike the ERISA "remand," a remand under sentence four complies with both *Buckhannon* and *Ruckelshaus* because it involves a "judgment" in favor of the claimant. Indeed, failure to file within the statutorily prescribed 30 days after entry of the judgment remanding the case to the SSA ALJ, will forfeit a claimant's right to seek attorney's fees. See *Melkonyan* v. *Sullivan*, 501 U.S. 89, 102 (1991). "'[E]ach final decision of the Secretary [is] reviewable by a *separate* piece of litigation,' and a sentence-four remand order *'terminate[s]* the civil action.'" *Schaefer*, 509 U.S., at 299 (quoting *Sullivan* v. *Finkelstein*, 496 U.S. 617, 624-25 (1990) (emphasis in original)).

Under a "sentence-six" remand, the district court retains jurisdiction during the remand and does not enter a final judgment until the post-remand proceedings before an SSA are complete. See 42 U.S.C. §405(g); *Schaefer*, 509 U.S., at 297. Under the SSA, a claimant can qualify for attorney's fees only if the ALJ or the district court awards benefits. Thus, if a claimant obtains a sentence-six remand but does not obtain benefits, he will not be eligible for attorney's fees.

Petitioner and the Solicitor General argue that an award of benefits on an ERISA "remand" is analogous to an award of benefits by an SSA ALJ on a sentence-six remand. However, the critical differences that this Court has "cautioned" make the SSA an inappropriate model for ERISA are particularly pronounced in this instance. The Court has recognized that the SSA remand procedure reflects the reviewing court's particularly close and unusual involvement in disability determinations made by ALJs. *Sullivan* v. *Hudson*, 490 U.S. 877, 885 (1989).

The SSA's "detailed provisions for the transfer of proceedings from the courts to the Secretary and for the filing of the Secretary's subsequent findings with the court * * * suggest[ ] *a degree of direct interaction between a federal court and an administrative agency alien to traditional review of agency action* under the Administrative Procedure Act." *Ibid.* (emphasis added). Moreover, "the district court's [SSA] remand order will often include detailed instructions concerning the

scope of the remand, the evidence to be adduced, and the legal or factual issues to be addressed." *Ibid.*

In contrast, due to the broad discretion ERISA gives private claims administrators in making benefit determinations, it is error for a reviewing court to tell the administrator how much weight to give certain evidence. *Nord*, 538 U.S., at 834.[25] The reviewing court has "*no warrant to require administrators automatically to accord special weight* to the opinions of a claimant's physician," "nor may courts impose on plan administrators a discrete burden of explanation when they credit reliable evidence that conflicts with a treating physician's evaluation." *Id.*, at 834. "A rule that requires plan administrators to consider certain types of evidence and to weigh that evidence in a compulsory manner would effectively undermine [the] discretion" that should be accorded to an administrator's decisions under a plan that gives it broad discretion over eligibility standards (as the plan here gave Reliance). *Firestone*, 489 U.S., at 115. The district court's circumscribed and distant role in ERISA "remands" makes the sentence-six remand cases inapposite.

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[25] The Secretary of Labor (in an opinion which the Court held must be given "deference") expressed her "view that ERISA is best served by '*preserv[ing] the greatest flexibility* possible for * * * operating claims processing systems consistent with the prudent administration of a plan." *Id*, at 833-34 (citing Dep't of Labor, Employee Benefits Security Admin., *available at* http://www.dol.gov/ebsa/faqs/faq_claims_proc_reg.html, Question B-4 (as visited May 6, 2003)) (emphasis added)

Third, the analogy to the SSA fails because the fee-shifting provision at issue in the SSA cases, the EAJA, has a markedly different purpose than §502(g). The EAJA is a remedial statute that provides for mandatory fee awards to encourage challenges to unreasonable governmental action. "Congress passed the EAJA in response to its concern that persons 'may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights,'" and "to rectify this situation." *Hudson*, 490 U.S., at 883. In the particular context of SSA proceedings, the SSA also reflects Congress's intent to encourage legal representation of individuals who seek review of SSA disability determinations. See 42 U.S.C. §1383(d)(1)(D).[26]

In contrast, ERISA's fee-shifting statute is an integral part of a statutory scheme that seeks to advance multiple substantive purposes and to balance different interests. See *Pilot Life*, 481 U.S., at 54. The statutes' fundamentally different purposes (and different language) caution against applying to one statute conclusions derived from an application of the other.

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[26] Claimants in SSA cases seek attorney's fees under Section (d)(1)(A) of the EAJA, a fee-shifting statute that provides for mandatory awards against the United States unless "the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. §2412(d)(1)(A) (emphasis added)

Finally, and critically, as Petitioner concedes, Pet. Br. 42 n.9, the EAJA requires a *judgment* in favor of the claimant before attorney's fees can be awarded. 28 U.S.C. §2412. And it is the absence of a judgment here that vitiates the essential precondition to an award of attorney's fees: "some success on the merits."

III. EVEN IF A DISCRETIONARY AWARD OF BENEFITS FOLLOWING A PROCEDURAL "REMAND" PERMITTED A COURT TO AWARD ATTORNEY'S FEES IN SOME INSTANCES, SUCH AWARDS SHOULD NOT BE BASED ON THE "FIVE-FACTOR TEST" THE TENTH CIRCUIT INVENTED, BUT ON THIS COURT'S CONSISTENT INTERPRETATION OF THE EXERCISE OF A COURT'S EQUITABLE POWERS

Even if the Court were to determine, contrary to *Ruckelshaus*, that claimants seeking attorney's fees under ERISA §502(g)(1) are eligible for attorney's fees despite not having achieved "some success on the merits," the Court should nonetheless reject the five-factor test—which was invented by the Tenth Circuit and is inconsistent with *Ruckelshaus* and ERISA—in favor of the common-law standards repeatedly cited in the Court's jurisprudence. A guide for the exercise of the district court's discretion consistent with ERISA, is the common-law trust principles as repeatedly articulated by the Court for over one hundred years.

A. The "Five-Factor" Test Invented by the Tenth Circuit Is Inconsistent with the Text, Purpose, and History of ERISA

Today, every Circuit, regardless of whether it has adopted a prevailing party requirement for §502(g)(1), applies some version of a five-factor test to determine if a district court should exercise its discretion to award fees. This test, which was invented by the Tenth Circuit in *Eaves* v. *Penn*, 587 F.2d 453 (10th Cir. 1978), examines:

> (1) the degree of the offending parties' culpability or bad faith; (2) the degree of the ability of the offending parties to personally satisfy an award of attorneys fees; (3) whether or not an award of attorneys fees against the offending parties would deter other persons acting under similar circumstances; (4) the amount of benefit conferred on members of the pension plan as a whole; and (5) the relative merits of the parties' position.

The Court should reject Petitioner's invitation to endorse this test.[27] First, the *Eaves* decision has rightly been criticized for failing to explain how it developed the factors, and the factors themselves have been criticized as having no connection with the

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[27] There is no merit in Petitioner's claim that Reliance has waived the right to object to the use of the five-factor test. Because petitioner did not raise her argument below, Reliance had no occasion to address it, and cannot be deemed to have waived its objection.

purposes of ERISA. See Mark Berlind, *Attorneys' Fees Under ERISA: When Is An Award Appropriate?*, 71 CORNELL L. REV. 1037, 1058-62 (1986) (calling the five-factor test "an unhelpful method for determining the appropriateness of awards to prevailing plaintiffs in ERISA action."); see also, *e.g.*, *Cent. States S.E. & S.W. Areas Pension Fund* v. *Hitchings Trucking, Inc.*, 492 F. Supp. 906, 909 (E.D. Mich. 1980).

Second, the Tenth Circuit in *Eaves* appeared to indicate that it believed that the award of fees should be routine in ERISA cases, explaining that "[b]y enacting a statutory authorization for award of attorney's fees, we believe Congress intended that the offending party bear the costs of the award, rather than non-culpable, non-party plan participants." 587 F.2d, at 464. However, any test that assumes that fee awards under §502(g)(1) are mandatory or that even presumes such awards should be routinely made would contradict Congress's careful balance in ERISA. Indeed, some circuits applying the *Eaves* five-factor test have held that there exists a presumption in favor of fees. See, *e.g.*, *Elliott* v. *Fortis Benefits Ins. Co.*, 337 F.3d 1138, 1148 (9th Cir. 2003). Most courts of appeal have properly rejected such a presumption; however, some have done so because "a presumption in favor of prevailing plaintiffs also would be overkill; *because the five basic factors have a built-in bias in favor of prevailing plaintiffs.*" *Cottrill* v. *Sparrow, Johnson & Ursillo, Inc.*, 100 F.3d 220, 226 (1st Cir.

1996); see also *Martin* v. *Ark. Blue Cross & Blue Shield*, 299 F.3d 966, 972 (8th Cir. 2002).

Even as some courts erroneously apply the five-factor test with its built-in "bias," they have recognized that in enacting §502(g)(1), Congress did not intend any presumption that fees must be awarded to plaintiffs who prevail in an ERISA action. See, *e.g.*, *Eddy*, 59 F.3d, at 205; *Iron Workers Local #272* v. *Bowen*, 624 F.2d 1255, 1265 (5th Cir. 1980).

To the extent Petitioner relies on trust-law principles to support fee awards under ERISA, she is wrong in insisting that the test's five factors "closely and appropriately track" trust law concepts. Pet. Br. 37. Indeed, nothing in the five-factor test purports to limit fee awards to situations in which they might be justified under common-law trust concepts.

B. The Best Guide for the Exercise of the District Court's Discretion Is Based on Common-Law Trust Principles as Articulated in This Court's Precedents

In view of ERISA's trust-law roots, if the Court decides to address what standards govern beyond *Ruckelshaus*'s "some success on the merits" minima, this Court should turn to the same common-law principles it has long recognized as governing attorney's fee awards in equity cases. See *Harris Trust & Savs. Bank* v. *Salomon Smith Barney, Inc.*, 530 U.S. 238, 250 (2000) ("The common law of trusts * * * offers a 'starting point for analysis [of ERISA] * * * [unless] it is inconsistent with the language of the statute, its

structure, or its purposes * * * * '" (internal quotations omitted) (quoting *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 447 (1999)); *Firestone*, 489 U.S., at 110.

This Court has long noted the power of courts in equity to award attorney's fees in appropriate situations. As Justice Frankfurter observed, "[a]llowance of [counsel fees] in appropriate situations is part of the historic equity jurisdiction of the federal courts." *Sprague* v. *Ticonic Nat'l Bank*, 307 U.S. 161, 164 (1939); see also *Trustees* v. *Greenough*, 105 U.S. 527, 536 (1881).

However, this discretion was not, as the Petitioner and the Solicitor General imply, without bounds. Rather, "such allowances [for attorney's fees] *are appropriate only in exceptional cases and for dominating reasons of justice*." *Sprague*, 307 U.S., at 167 (emphasis added).

This Court has recognized two basic equitable exceptions to the "American rule": (1) the *common fund*, or common-benefit doctrine, which allows fee awards when the plaintiff's success in a lawsuit has created a common fund for the benefit of others and from which the fees may be paid, *Alyeska*, 421 U.S., at 257 (common benefit doctrine applies when a person preserves or recovers a fund "for the benefit of others in addition to himself"); *Fleischmann*, 386 U.S., at 719; and (2) the *bad-faith* exception, which applies when the defendant has acted in bad faith or vexatiously, *Alyeska*, 421 U.S. at 258-59; *F.D. Rich*,

417 U.S., at 129 (noting that this Court has "long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons * * * ").[28] Although nothing prohibits a court in equity from awarding fees outside these recognized exceptions, courts in equity award fees only "when *overriding considerations of justice seemed to compel such a result.*" *Fleischmann*, 386 U.S., at 718-19 (emphasis added).

The statutes and cases that the Solicitor General and Petitioner cite do not suggest that the Court's cases have inaccurately described the generally limited award of fees at equity. There is nothing in the Uniform Trust Code §1004, or the Massachusetts probate statute on which it is based, which suggests their broad language is intended to allow equity courts to award fees to parties who do not "in some sense" prevail on the merits. Pet. Br. 33-34. The materials themselves do not reflect any intent to depart from accepted trust law principles. To the contrary, the comment to §1004 asserts the same basic principles of trust law that this Court and leading treatises have recognized as supporting fee awards. See Uniform Trust Code §1004 (litigation expenses are "chargeable" "only in the case of egregious

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[28] Some courts also recognize a third exception to the "American rule," known as the "private attorney general" doctrine. This Court has rejected that exception, which does not apply here in any event. See *Alyeska*, 421 U.S., at 269-71.

conduct such as bad faith or fraud," or when litigation "is deemed beneficial to the trust.").

Although Petitioner relies on *Dardovitch* v. *Halzman*, 190 F.3d 125, 146-47 (3d Cir. 1999), that case awarded fees based on the same two exceptions that are recognized under the common law, namely, because the trustee acted in bad faith and the litigation "resulted in the return of funds to the Trust" such that "a substantial amount of funds will be preserved for the beneficiaries."[29] *Sprague*, which the Solicitor General cites, involved litigation that, unlike the suit here, benefited others, and thus rests on the common-benefit exception. 307 U.S., at 166 ("the petitioner by establishing her claim necessarily established the claims of *fourteen other trusts* pertaining to the same bonds"). And all the other cases the Solicitor General cites likewise involve either the common-fund exception or a plaintiff who achieved at least some success on the merits.[30] Moreover, to the extent

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[29] The only case petitioner cites in which a court of equity actually awarded fees to a party who did not obtain the requested relief is an isolated probate decision of the Delaware Chancery Court *In re Catell's Estate*, 38 A.2d 466 (1944). The court awarded attorney's fees without further comment and therefore the decision should be accorded very little weight. *Ibid.*

[30] See U.S. Br. 15-18 (citing *In re Bitton's Trust*, 244 N.Y.S.2d 926, 931-33 (Sup. Ct. 1963) (Plaintiff prevailed in part and suit was beneficial to others); *Crutcher* v. *Joyce*, 146 F.2d 518, 520-21 (10th Cir. 1945) (attorney's fees not awarded "as a matter of course" to the successful party in an equity proceeding); *Daniel* v. *White*, 252 S.E.2d 912, 915 (S.C. 1979) (endorsing the common-fund doctrine); *Marshall* v. *Babson Inst.*,

(Continued on following page)

the cases and statutes cited by the Solicitor General seemingly allow a losing party to obtain fees under ERISA, they are incompatible with *Ruckelshaus*.

Trust law as consistently interpreted by the Court, is a far more appropriate (and consistent) guide than the "five-factor" test for discretionary fee awards under §502(g)(1). If the Court reaches the second question, it should adopt the common-law test as previously articulated by the Court and remand to the lower court for appropriate consideration of the test in the first instance.

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254 N.E.2d 886 (Mass. 1970) (apparently cited by the Solicitor General in error; does not address attorney's fees); *Hurley* v. *Noone*, 196 N.E.2d 905, 910 (Mass. 1964) (awarding fees to estate administrator for lawsuit that resolved confusion about the ownership of a fund held by estate).

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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FEDERAL STATUTES THAT AUTHORIZE AWARDS OF ATTORNEY'S FEES

I. STATUTORY PROVISIONS WITH MANDATORY FEE SHIFTING

Equal Access to Justice Act
5 U.S.C. §504(a)(1) (see also, 28 U.S.C. §2412)

An agency that conducts an adversary adjudication shall award, to the prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

Privacy Act
5 U.S.C. §552a(g)(4)

In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of * * * the costs of the action together with reasonable attorney fees as determined by the court.

Whistleblower Protection Act of 1989
5 U.S.C. §1221(g)(1)(B)

Corrective action shall include attorney's fees and costs * * * *

5 U.S.C. §1221(g)(2)

If an employee, former employee, or applicant for employment is the prevailing party before the Merit Systems Protection Board and the decision is based on a finding of a prohibited personnel practice, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorney's fees and any other reasonable costs incurred.

5 U.S.C. §1221(g)(3)

If an employee, former employee, or applicant for employment is the prevailing party in an appeal from the Merit Systems Protection Board, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorney's fees and any other reasonable costs incurred, regardless of the basis of the decision.

Implementing Recommendations of the 9/11 Commission Act of 2007
6 U.S.C. §1104(c)

Any person or authorized official found to be immune from civil liability under this section shall be entitled to recover from the plaintiff all reasonable costs and attorney fees.

Commodity Exchange Act
7 U.S.C. §18(c)

In case a complaint is made by a nonresident of the United States, the complainant shall be required, before any formal action is taken on his complaint, to furnish a bond in double the amount of the claim conditioned upon the payment of costs, including a reasonable attorney's fee for the respondent if the respondent shall prevail * * * *

7 U.S.C. §18(d)

If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

7 U.S.C. §18(e)

If the appellee prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of his costs.

Packers and Stockyards Act
7 U.S.C. §210(f)

If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit.

Perishable Agricultural Commodities Act
7 U.S.C. §499f(e)

In case a complaint is made by a nonresident of the United States * * * the complainant shall be required * * * to furnish a bond * * * conditioned upon the payment of costs, including a reasonable attorney's fee for respondent if the respondent shall prevail * * * *

7 U.S.C. §499g(b)

If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

7 U.S.C. §499g(c)

Either party adversely affected by the entry of a reparation order by the Secretary may * * * appeal therefrom * * * * Such appeal shall not be effective unless * * * the appellant also files with the clerk a bond * * * conditioned upon the payment of the judgment entered by the court, plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail * * * * [I]f appellee prevails he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of his costs.

Federal Crop Insurance Act
7 U.S.C. §1507(c)

The Board shall provide such agents and brokers with indemnification, including costs and reasonable attorney fees, from the Corporation for errors or omissions on the part of the Corporation or its contractors for which the agent or broker is sued or held liable, except to the extent the agent or broker has caused the error or omission.

7 U.S.C. §1508(j)(3)

The Corporation shall provide approved insurance providers with indemnification, including costs and reasonable attorney fees incurred by the approved insurance provider, due to errors or omissions on the part of the Corporation.

Bankruptcy Act (as amended by P.L. 109-8 (2005))
11 U.S.C. §110(i)(1)

[I]f a bankruptcy petition preparer ["a person, other than an attorney"] violates this section or commits any act that the court finds to be fraudulent, unfair, or deceptive * * *, the court shall order the bankruptcy petition preparer to pay to the debtor * * * (C) reasonable attorneys' fees and costs in moving for damages under this subsection.

11 U.S.C. §110(i)(2)

If the trustee or creditor moves for damages on behalf of the debtor under this subsection, the bankruptcy petition preparer shall be ordered to pay the movant the additional amount of $1,000 plus reasonable attorneys' fees and costs incurred.

11 U.S.C. §110(j)(4)

The court shall award to a debtor, trustee, or creditor that brings a successful action under this subsection reasonable attorneys fees and costs of the action, to be paid by the bankruptcy petition preparer.

11 U.S.C. §111(g)(2)

A nonprofit budget and credit counseling agency that willfully or negligently fails to comply with any requirement under this title with respect to a debtor shall be liable for * * * any court costs or reasonable attorneys' fees * * * *

11 U.S.C. §362(h)

[A]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, punitive damages.

11 U.S.C. §503(b)

After notice and a hearing, there shall be allowed administrative expenses * * * including—(4) reasonable compensation for professional services rendered by an attorney * * * *

11 U.S.C. §506(b)

To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest upon such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.

11 U.S.C. §526(c)(2)

Any debt relief agency shall be liable to an assisted person * * * for reasonable attorneys' fees and costs * * * *

11 U.S.C. §526(c)(3)(C)

[I]n the case of any successful action under subparagraphs (A) or (B), [the State] shall be awarded the costs of the action and reasonable attorneys' fees as determined by the court.

Federal Home Loan Bank Act
12 U.S.C. §1441a(c)(11)(B)

The parties specified in the preceding sentence shall be entitled to reasonable attorney fees upon prevailing in any such judicial action.

Home Owners' Loan Act
12 U.S.C. §1464(q)(3)

Any person injured by a violation of paragraph (1) may bring an action * * * and shall be entitled to recover three times the amount of the damages sustained, and the cost of the suit, including a reasonable attorney's fee.

Bank Tying Act
12 U.S.C. §1975

Any person who is injured in his business or property by reason of anything forbidden in section 1972 of this title * * * shall be entitled to recover * * * a reasonable attorney's fee.

Real Estate Settlement Procedures Act
12 U.S.C. §2605(f)

Whoever fails to comply with any provision of this section shall be liable to the borrower for each such failure in the following amounts: * * * (3) Costs.—In addition to the amounts under paragraph (1) or (2), in the case of any successful action under this section,

the costs of the action, together with any attorneys fees incurred in connection with such action as the court may determine to be reasonable under the circumstances.

Right to Financial Privacy Act of 1978
12 U.S.C. §3417(a)

Any agency or department of the United States or financial institution obtaining or disclosing financial records or information obtained therein in violation of this chapter is liable to the customer to whom such records relate * * * (4) in the case of any successful action to enforce liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

12 U.S.C. §3418

In the event of any successful action [for injunctive relief], costs together with reasonable attorney's fees as determined by the court may be recovered.

Expedited Funds Availability Act
12 U.S.C. §4010(a)

[A]ny depository institution which fails to comply with any requirement imposed under this title * * * is liable * * * (3) in the case of any successful action to enforce the foregoing liability, [for] the costs of the

action, together with a reasonable attorney's fee as determined by the court.

Truth in Savings Act
12 U.S.C. §4310(a)(3)

[A]ny depository institution which fails to comply with any requirement imposed under this subtitle * * * is liable * * * in an amount equal to the sum of * * * (3) in the case of any successful action to enforce any liability under paragraph (1) or (2), the costs of the action, together with a reasonable attorney's fee as determined by the court.

Homeowners Protection Act of 1998
12 U.S.C. §4907

Any servicer, mortgagee, or mortgage insurer that violates a provision of this Act shall be liable to each mortgagor to whom the violation relates for * * * (4) reasonable attorney fees, as determined by the court.

Check Clearing for the 21st Century Act
or Check 21 Act
12 U.S.C. §5005(b)

The amount of the indemnity under subsection (a) shall be the amount of any loss (including costs and reasonable attorney's fees and other expenses of representation) proximately caused by a breach of a warranty provided under section 5 * * * * In the

absence of a breach of warranty provided under section 5, the amount of the indemnity under subsection (a) shall be * * * interest and expenses (including costs and reasonable attorney's fees and other expenses of representation).

12 U.S.C. §5009(a)(1)

[A]ny person who, in connection with a substitute check, breaches any warranty under this Act or fails to comply with any requirement imposed by, or regulation prescribed pursuant to, this Act * * * shall be liable [for] * * * interest and expenses (including costs and reasonable attorney's fees and other expenses of representation) related to the substitute check.

Clayton Act
15 U.S.C. §15(a)

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages sustained by him, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. §15c(a)(2)

The court shall award the State as monetary relief threefold the total damage sustained as described in paragraph (1) of this subsection, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. §26

In any action under this section in which the plaintiff substantially prevails the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

Unfair Competition Act
15 U.S.C. §72

Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor * * * and shall recover * * * a reasonable attorney's fee.

Securities Exchange Act of 1934
15 U.S.C. §78u(h)(8)

In the case of an unsuccessful action under paragraph (7), the court shall award the costs of the action and attorney's fees to the Commission if the presiding judge or magistrate finds that the customer's claims were made in bad faith.

Securities Investor Protection Act
15 U.S.C. §78eee(b)(5)(A)

The court shall grant reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred * * * by a trustee, and by the

attorney for such trustee, in connection with a liquidation proceeding.

Jewelers' Liability Act
15 U.S.C. §298(b)

Any competitor, customer, or competitor of a customer * * * may sue * * * and shall recover * * * a reasonable attorney's fee.

15 U.S.C. §298(c)

Any duly organized and existing jewelry trade association shall be entitled to injunctive relief * * * and if successful shall recover the cost of suit, including a reasonable attorney's fee.

15 U.S.C. §298(d)

Any defendant against whom a civil action is brought under the provisions of sections 294 to 300 of this title shall be entitled to recover the cost of defending the suit, including a reasonable attorney's fee, in the event such action is terminated without a finding by the court that such defendant is or has been in violation of sections 294 to 300 of this title.

Lanham (Trademark) Act
15 U.S.C. §1116(d)(11)

Any person who suffers damage by reason of a wrongful seizure under this subsection has a cause of action against the applicant for the order under which the seizure was made, and shall be entitled * * * unless the court finds extenuating circumstances, to recover a reasonable attorney's fee.

15 U.S.C. §1117(b)

In assessing damages under subsection (a) of this section, the court shall, unless the court finds extenuating circumstances, enter judgment for three times such profits or damages, whichever is greater, together with a reasonable attorney's fee * * * *

Truth in Lending Act
15 U.S.C. §1640(a)

[A]ny creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title, or part D or E of this subchapter [the Fair Credit Billing Act or the Consumer Leasing Act] with respect to any person is liable [for] * * * the costs of the action, together with a reasonable attorney's fee as determined by the court.

Consumer Leasing Act
15 U.S.C. §1667b(a) (see also, 15 U.S.C. §1640(a))

In all actions, the lessor shall pay the lessee's reasonable attorney's fees.

Credit Repair Organization Act
15 U.S.C. §1679g(a)

Any person who fails to comply with any provision of this title with respect to any other person shall be liable in an amount equal to * * * (3) * * * [i]n the case of any successful action to enforce any liability under paragraph (1) or (2), the costs of the action, together with a reasonable attorneys' fee.

Fair Credit Reporting Act
15 U.S.C. §1681n(c)

Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

15 U.S.C. §1681o(b)

On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for

purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

15 U.S.C. §1681s(c)(1)

In addition to such other remedies as are provided under State law, if the chief law enforcement officer of a State, or an official or agency designated by the State, has reason to believe that any person has violated or is violating this title, the State * * * (C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorney fees as determined by the court.

15 U.S.C. §1681u(i)

Any agency or department of the United States obtaining or disclosing any consumer reports, records, or information contained therein in violation of this section is liable to the consumer to whom such consumer reports, records, or information relate in an amount equal to the sum of * * * (4) in the case of any successful action to enforce liability under this subsection, the costs of the action, together with reasonable attorney fees, as determined by the court.

Equal Credit Opportunity Act
15 U.S.C. §1691e(d)

In the case of any successful action under subsection (a), (b), or (c), the costs of the action, together with a reasonable attorney's fee as determined by the court, shall be added to any damages awarded by the court under such subsection.

Fair Debt Collection Practices Act
15 U.S.C. §1692k(a)

[A]ny debt collector who fails to comply with any provision of this title with respect to any person is liable [for] * * * a reasonable attorney's fee as determined by the court.

On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

Electronic Fund Transfer Act
15 U.S.C. §1693m(a)

[A]ny person who fails to comply with any provision of this title with respect to any consumer * * * is liable [for] * * * a reasonable attorney's fee as determined by the court.

15 U.S.C. §1693m(f)

On a finding by the court that an unsuccessful action under this section was brought in bad faith or for purposes of harassment, the court shall award the defendant attorney's fees reasonable in relation to the work expended and costs.

Toxic Substances Control Act
15 U.S.C. §2622(b)(2)(B)

If such an order issued, the Secretary, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) reasonably incurred, as determined by the Secretary * * * *

Petroleum Marketing Practices Act
15 U.S.C. §2805(d)(1)

If the franchisee prevails in any action under subsection (a), such franchisee shall be entitled * * * to reasonable attorney and expert witness fees to be paid by the franchisor, unless the court determines that only nominal damages are to be awarded to such franchisee, in which case the court, in its discretion, need not direct that such fees be paid by the franchisor.

Export Trading Company Act of 1982
15 U.S.C. §4016(b)(4)

In any action brought under paragraph (1), if the court finds that the conduct does comply with the standards of section 303(a) [15 U.S.C. §4013(a)], the court shall award to the person against whom the claim is brought the cost of suit attributable to defending the claim (including a reasonable attorney's fee).

National Cooperative Research Act of 1984
15 U.S.C. §4303(a)

Notwithstanding section 4 of the Clayton Act (15 U.S.C. 15) and in lieu of the relief specified in such section, any person who is entitled to recovery on a claim under such section shall recover * * * the cost of suit attributable to such claim, including a reasonable attorney's fee pursuant to section 5 of this Act [15 U.S.C. §4304] * * * *

15 U.S.C. §4303(b)

Notwithstanding section 4C of the Clayton Act (15 U.S.C. 15c), and in lieu of the relief specified in such section, any State that is entitled to monetary relief on a claim under such section shall recover * * * the cost of suit attributable to such claim, including a reasonable attorney's fee pursuant to section 4C of the Clayton Act * * * *

15 U.S.C. §4303(c)

Notwithstanding any provision of any State law providing damages for conduct similar to that forbidden by the antitrust laws, any person who is entitled to recover on a claim under such provision shall not recover in excess of * * * the cost of suit attributable to such claim, including a reasonable attorney's fee pursuant to section 5 of this Act [15 U.S.C. §4304] * * * *

15 U.S.C. §4304(a)

Notwithstanding sections 4 and 16 of the Clayton Act [15 U.S.C. §§15 and 26], in any claim under the antitrust laws, or any State law similar to the antitrust laws, based on the conducting of a joint venture, the court shall, at the conclusion of the action—(1) award to a substantially prevailing claimant the cost of suit attributable to such claim, including a reasonable attorney's fee, or (2) award to a substantially prevailing party defending against any such claim the cost of suit attributable to such claim, including a reasonable attorney's fee, if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith.

Public Utility Regulatory Policies Act of 1978
16 U.S.C. §2632(a)

[S]uch utility shall be liable to compensate such consumer (pursuant to paragraph (2)) for reasonable

attorneys' fees, expert witness fees, and other reasonable costs incurred.

Alaska National Interest Lands Conservation Act
16 U.S.C. §3117(a) (see also, 43 U.S.C. §1631(c)(3))

Local residents and other persons and organizations who are prevailing parties in an action filed pursuant to this section shall be awarded their costs and attorney's fees.

Federal Cave Resources Protection Act of 1988
16 U.S.C. §4307(c)

If any person fails to pay an assessment of a civil penalty * * * the Attorney General shall bring a civil action in an appropriate United States district court to recover the amount of the penalty assessed (plus costs, attorney's fees, and interest * * * *).

Gun Control Act of 1968
18 U.S.C. §922 note (as amended by P.L. 110-180, §101(c)(2)(A)(iii))

If the denial of a petition for relief has been reversed after such judicial review, the court shall award the prevailing party, other than the United States, a reasonable attorney's fee for any and all proceedings in relation to attaining such relief, and the United States shall be liable for such fee. Such fee shall be based upon the prevailing rates awarded to public

interest legal aid organizations in the relevant community.

18 U.S.C. §924(d)(2)(A)

In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

18 U.S.C. §924(d)(2)(B)

In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

18 U.S.C. §924(d)(2)(D)

The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

Civil Asset Forfeiture Reform Act of 2000
18 U.S.C. §983(b)(2)(B)(ii)

The court shall enter a judgment in favor of the Legal Services Corporation for reasonable attorney fees and costs submitted pursuant to clause (i) and treat such judgment as payable under section 2465 of title 28, United States Code, regardless of the outcome of the case.

Major Fraud Act of 1988
18 U.S.C. §1031(h)

Any individual who * * * is * * * discriminated against in the terms or conditions of employment by an employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of a prosecution under this section * * * may, in a civil action, obtain all relief necessary to make such individual whole. Such relief shall include * * * compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees.

Organized Crime Control Act of 1970
18 U.S.C. §1964(c)

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may * * * sue and shall recover * * * a reasonable attorney's fee * * * *

Child Abuse Victims' Rights Act of 1986
18 U.S.C. §2255(a)

Any minor who is a victim of a violation of section 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423 of this title and who suffers personal injury as a result of such violation may sue in any appropriate United States District Court and shall recover the actual damages such minor sustains and the cost of the suit, including a reasonable attorney's fee.

Safe Streets for Women Act of 1994
18 U.S.C. §2259(b)

The order of restitution under this section shall direct the defendant pay to the victim * * * the full amount of the victim's losses as determined by the court * * * [including] attorneys' fees, as well as other costs incurred * * * *

Safe Homes for Women Act of 1994
18 U.S.C. §2264(b)

The order of restitution under this section shall direct the defendant pay to the victim * * * the full amount of the victim's losses as determined by the court * * * [including] attorneys' fees plus any costs incurred in obtaining a civil protection order * * * *

Antiterrorism Act of 1990
18 U.S.C. §2333(a)

Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

Financial Institutions Anti-Fraud Enforcement Act of 1990
18 U.S.C. §3059A(e)(2) (see also, 12 U.S.C. §4246)

(1) A person who * * * is * * * discriminated against in the terms or conditions of employment by an employer because of lawful acts done by the person on behalf of the person or others in furtherance of a prosecution under any of the sections referred to in subsection (a) * * * may, in a civil action, obtain all relief necessary to make the person whole. (2) Relief under paragraph (1) shall include * * * compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees.

Witness Security Reform Act of 1984
18 U.S.C. §3524(d)(6)

The United States shall be required by the court to pay litigation costs, including reasonable attorneys'

fees, incurred by a parent who prevails in enforcing a custody or visitation order; but shall retain the right to recover such costs from the protected person.

Higher Education Act of 1965
20 U.S.C. §1095a(8)

The court shall award attorneys' fees to a prevailing employee * * * *

Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996
22 U.S.C. §6082(a)(1)(A)(ii)

[A]ny person that * * * traffics in property which was confiscated by the Cuban Government on or after January 1, 1959, shall be liable to any United States national who owns the claim of such property for * * * court costs and reasonable attorneys' fees.

Indian Self-Determination and Education Assistance Act
25 U.S.C. §450m-1(c)

The Equal Access to Justice Act [5 U.S.C. §504, 28 U.S.C. §2412] shall apply to administrative appeals * * * by tribal organizations regarding self-determination contracts.

Navajo and Hopi Indian Relocation Amendments Act of 1980
25 U.S.C. §640d-27(a)

In any litigation or court action between or among the Hopi Tribe, the Navajo Tribe and the United States or any of its officials, departments, agencies, or instrumentalities, arising out of the interpretation or implementation of this subchapter, as amended, the Secretary shall pay, subject to the availability of appropriations, attorney's fees, costs and expenses as determined by the Secretary to be reasonable.

25 U.S.C. §640d-27(b)

Upon the entry of a final judgment in any such litigation or court action, the court shall award reasonable attorney's fees, costs and expenses to the party, other than the United States or its officials, departments, agencies, or instrumentalities, which prevails or substantially prevails, where it finds that any opposing party has unreasonably initiated or contested such litigation. Any party to whom such an award has been made shall reimburse the United States out of such award to the extent that it has received payments pursuant to subsection (a) of this section.

Internal Revenue Code
26 U.S.C. §6110(i)(2)

In any suit brought under the provisions of paragraph (1)(A) * * * or in any suit brought under subparagraph

(1)(B) * * * the United States shall be liable [for] the costs of the action together with reasonable attorney's fees as determined by the Court.

26 U.S.C. §7434(b)

In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to greater of $5,000 or the sum of—(1) any actual damages * * * (2) the costs of the action, and (3) in the court's discretion, reasonable attorneys' fees.

Equal Access to Justice Act
28 U.S.C. §2412 (see also, 5 U.S.C. §504)

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States * * * unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(d)(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United

States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized under subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

Civil Asset Forfeiture Reform Act of 2000
28 U.S.C. §2465(b)(1)

Except as provided in paragraph (2), under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for—(A) reasonable attorney fees and other litigation costs reasonably incurred by the claimant.

Civil Asset Forfeiture Reform Act of 2000
28 U.S.C. §2465(b)(1)

Except as provided in paragraph (2), in any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for—(A) reasonable attorney fees and other litigation costs reasonably incurred by the claimant.

Fair Labor Standards Act
29 U.S.C. §216(b)

The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

Age Discrimination in Employment Act of 1967
29 U.S.C. §626(b)

This section incorporates the attorneys' fees provision of the Fair Labor Standards Act, 29 U.S.C. §216(b).

Employee Retirement Income Security Act
29 U.S.C. §1132(g)(2)

In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—(D) reasonable attorney's fees and costs of the action, to be paid by the defendant. . . .

Family and Medical Leave Act of 1993
29 U.S.C. §2617(a)(3)

The court in such an action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant.

Federal Coal Mine Health and Safety Act of 1969
30 U.S.C. §815(c)(3)

Whenever any order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) * * * shall be assessed against the person committing such violation.

Black Lung Benefits Act
30 U.S.C. §938(c)

Whenever an order is issued under this subsection granting relief to a miner at the request of such miner, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) * * * shall be assessed against the person committing the violation.

Surface Mining Control and Reclamation Act
30 U.S.C. §1293(c)

Whenever an order is issued under this section to abate any violation, at the request of the applicant a sum equal to the aggregate amount of all costs and expenses (including attorneys' fees) * * * shall be assessed against the persons committing the violation.

Debt Collection Improvement Act of 1996
31 U.S.C. §3720D(e)(2)

The court shall award attorneys' fees to a prevailing employee * * * *

31 U.S.C. §3720D(f)(1)(B)

The employer of an individual * * * shall be liable for any amount that the employer fails to withhold from wages due an employee following receipt by such employer of notice of the withholding order, plus attorneys' fees, costs, and, in the court's discretion, punitive damages.

False Claims Act
31 U.S.C. §3730(d)(1)

Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

31 U.S.C. §3730(d)(2)

Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

31 U.S.C. §3730(g)

In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

31 U.S.C. §3730(h)

Such relief shall include * * * litigation costs and reasonable attorneys' fees.

Longshore and Harbor Workers' Compensation Act
33 U.S.C. §928(a)

[T]here shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, the Board, or court, as the case may be * * * *

33 U.S.C. §928(b)

[A] reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation * * * * If the claimant is successful in review proceedings before the Board or court in any such case an award may be made in favor of the claimant and against the employer or carrier for a reasonable attorney's fee for claimant's counsel * * * *

33 U.S.C. §933(e)(1)

The employer shall retain an amount equal to—(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee) as determined by the deputy commissioner or Board * * * *

Water Pollution Prevention and Control Act
33 U.S.C. §1319(g)(9)

Any person who fails to pay on a timely basis the amount of an assessment of a civil penalty as described in the first sentence of this paragraph shall be required to pay, in addition to such amount and interest, attorneys fees and costs for collection proceedings * * * *

33 U.S.C. §1321(b)(6)(H)

Any person who fails to pay on a timely basis the amount of an assessment of a civil penalty as described in the first sentence of this subparagraph shall be required to pay, in addition to such amount and interest, attorneys fees and costs for collection proceedings * * * *

33 U.S.C. §1367(c)

[A] sum equal to the aggregate amount of all costs and expenses (including the attorney's fees), as determined by the Secretary of Labor * * * shall be

assessed against the person committing such violation.

Safe Drinking Water Act
42 U.S.C. §300j-9(i)(2)(B)(ii)

If such an order is issued, the Secretary, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' fees) reasonably incurred * * * *

National Childhood Vaccine Injury Act of 1986
42 U.S.C. §300aa-15(e)

(1) In awarding compensation on a petition filed under section 300aa-11 of this title the special master or court shall also award as part of such compensation an amount to cover—(A) reasonable attorneys' fees, and (B) other costs, incurred in any proceeding on such petition. If the judgment of the United States Court of Federal Claims on such a petition does not award compensation, the special master or court may award an amount of compensation to cover petitioner's reasonable attorneys' fees and other costs incurred in any proceeding on such petition if the special master or court determines that the petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought.

Contract Disputes Act of 1978
41 U.S.C. §§601 *et seq.*

See, 28 U.S.C. §2412(d)(3)

Social Security Act
42 U.S.C. §669a(c)

In any action brought under paragraph (1), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the sum of * * * (B) the costs (including attorney's fees) of the action.

Homeownership and Opportunity Through HOPE Act
42 U.S.C. §1437aaa-4(h)
(see also, 42 U.S.C. §§12875, 12895)

The parties specified in the preceding sentence shall be entitled to reasonable attorney fees upon prevailing in any such judicial action.

Legal Services Corporation Act
42 U.S.C. §2996e(f)

If an action is commenced by the Corporation or by a recipient and a final order is entered in favor of the defendant and against the Corporation or a recipient's plaintiff, the court shall, upon motion by the defendant and upon a finding by the court that the action was commenced or pursued for the sole

purpose of harassment of the defendant or that the Corporation or a recipient's plaintiff maliciously abused legal process, enter an order (which shall be appealable before being made final) awarding reasonable costs and legal fees incurred by the defendant in defense of the action, except when in contravention of a State law, a rule or court, or a statute of general applicability. Any such costs and fees shall be directly paid by the Corporation.

National Flood Insurance Act of 1968
42 U.S.C. §4081(c)

The Director of the Federal Emergency Management Agency * * * shall provide any such agent or broker with indemnification, including court costs and reasonable attorney fees, arising out of and caused by an error or omission on the part of the Federal Emergency Management Agency and its contractors.

Uniform Relocation Assistance and Real Property Acquisition Policies Act
42 U.S.C. §4654

(a) The Federal court * * * shall award * * * such a sum as will in the opinion of the court reimburse such owner for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings, if * * * *

(c) The court rendering a judgment for the plaintiff in a proceeding brought under section 1346(a)(2) or 1491 of Title 28, awarding compensation for the taking of property by a Federal agency, or the Attorney General effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff * * * reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

Robert T. Stafford Disaster Relief and Emergency Assistance Act
42 U.S.C. §5207

In any action or proceeding to enforce this section, the court shall award the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

National Manufactured Housing Construction and Safety Standards Act
42 U.S.C. §5412(b)

[T]he person bringing the action shall also be entitled to recover any damage sustained by him, as well as all court costs plus reasonable attorneys' fees.

Energy Reorganization Act of 1974
42 U.S.C. §5851(b)(2)(B)

If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred * * * *

Age Discrimination Act of 1975
42 U.S.C. §6104(e)(1)

Such interested person may elect, by a demand for relief in his complaint, to recover reasonable attorney's fees, in which case the court shall award the costs of the suit, including a reasonable attorney's fee, to the prevailing plaintiff.

National Oil Heat Research Alliance Act of 2000
42 U.S.C. §6201 note

(1) Meritorious Case—In a case in Federal court in which the court grants a public utility injunctive relief under subsection (d), the public utility shall be entitled to recover an attorney's fee from the Alliance and any qualified State association undertaking the consumer education activity with respect to which a complaint under this section is made.

(2) Nonmeritorious Case—In any case under subsection (d) in which the court determines a complaint

under subsection (b) to be frivolous and without merit, the prevailing party shall be entitled to recover an attorney's fee.

Solid Waste Disposal Act
42 U.S.C. §6971(c)

[A] sum equal to the aggregate amount of all costs and expenses (including attorney's fees) * * * shall be assessed against the person committing such violation.

Clean Air Act
42 U.S.C. §7524(c)(6)

Any person who fails to pay on a timely basis the amount of an assessment of a civil penalty as described in the first sentence of this paragraph shall be required to pay, in addition to that amount and interest, the United States' enforcement expenses, including attorneys fees and costs for collection proceedings * * * *

42 U.S.C. §7622(b)(2)(B)

If an order is issued under this paragraph, the Secretary, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of costs and expenses (including attorneys' and expert witness fees) reasonably incurred * * * *

Comprehensive Environmental Response, Compensation, and Liability Act
42 U.S.C. §9610(c)

Whenever an order is issued under this section to abate such violation, at the request of the applicant a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees) * * * shall be assessed against the person committing such violation.

Health Care Quality Improvement Act of 1986
42 U.S.C. §11113

[T]he court shall award to a substantially prevailing party defending against any such claim the cost of the suit attributable to such claim, including a reasonable attorney's fee, if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith * * * *

International Child Abduction Remedies Act
42 U.S.C. §11607(b)(3)

Any court ordering the return of a child pursuant to an action brought under section 11603 of this title shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees * * * unless the respondent establishes that such order would be clearly inappropriate.

National and Community Service Act of 1990
42 U.S.C. §12636(f)(4)(D)(ii)

If a participant, labor organization, or other interested individual described in paragraph (1) prevails under a binding arbitration proceeding, the State or local applicant described in paragraph (1) that is a party to such grievance shall pay the total cost of such proceeding and the attorneys' fees of such participant, labor organization, or individual, as the case may be.

Homeownership and Opportunity Through HOPE Act
42 U.S.C. §12875(e) (see also, 42 U.S.C. §1437aaa-4(h))

The parties specified in the preceding sentence shall be entitled to reasonable attorney fees upon prevailing in any such judicial action.

42 U.S.C. §12895(d)

The parties specified in the preceding sentence shall be entitled to reasonable attorney fees upon prevailing in any such judicial action.

Alaska National Interest Lands Conservation Act
43 U.S.C. §1631(c)(3) (see also, 16 U.S.C. §3117(a))

If title to land conveyed to a Native Corporation pursuant to the Alaska Native Claims Settlement Act or this Act which underlies a lake, river, or stream is challenged in a court of competent jurisdiction and

such court determines that such land is owned by the Native Corporation, the Native Corporation shall be awarded a money judgment against the plaintiffs in an amount equal to its costs and attorney's fees, including costs and attorney's fees incurred on appeal.

Outer Continental Shelf Lands Act
43 U.S.C. §1845(e) (see also, 43 U.S.C. §1349)

If the decision of the Secretary under subsection (d) of this section is in favor of the commercial fisherman filing the claim, the Secretary, as a part of the amount awarded, shall include reasonable claim preparation fees and reasonable attorney's fees, if any, incurred by the claimant in pursuing the claim.

Railway Labor Act
45 U.S.C. §153(p)

If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee to be taxed and collected as part of the costs of the suit.

Shipping Code (as codified by P.L. 109-304 (2006))
46 U.S.C. §58106(c)

A person whose business or property is injured by a violation of subsection (a) may bring a civil action in the district court of the United States for the district in which the defendant resides, is found, or has an

agent. If the person prevails, the person shall be awarded—(1) 3 times the damages; and (2) costs, including reasonable attorney fees.

Communications Act of 1934
47 U.S.C. §206

[S]uch common carrier shall be liable to the person or persons injured thereby for * * * a reasonable counsel or attorney's fee * * * *

Satellite Home Viewer Improvement Act of 1999
47 U.S.C. §325(e)(8)(B)(iii)

If the Commission determines that a satellite carrier has retransmitted the television broadcast station to at least one person in the local market of such station and has failed to meet its burden of proving one of the defenses under paragraph (4) with respect to such retransmission, the Commission shall be required to * * * issue an order, within 45 days after the filing of the complaint, containing * * * an award to the complainant of that complainant's costs and reasonable attorney's fees.

47 U.S.C. §407

If the petitioner shall finally prevail, he shall be allowed a reasonable attorney fee to be fixed by the court.

Alien Owners of Land
48 U.S.C. §1506

[S]uch suit shall be dismissed on payment of costs and a reasonable attorney fee to be fixed by the court.

ICC Termination Act of 1995
49 U.S.C. §11704(d)(3)

The district court shall award a reasonable attorney's fee as a part of the damages for which a rail carrier if found liable under this subsection. The district court shall tax and collect that fee as a part of the costs of the action.

49 U.S.C. §11707(b)

The court shall award a reasonable attorney's fee to the plaintiff in a judgment against the defendant rail carrier under subsection (a) of this section. The court shall tax and collect that fee as a part of the costs of the action.

49 U.S.C. §14704(e)

The district court shall award a reasonable attorney's fee under this section. The district court shall tax and collect that fee as a part of the costs of the action.

49 U.S.C. §14708(d)

In any court action to resolve a dispute between a shipper of household goods and a carrier providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 concerning the transportation of household goods by such carrier, the shipper shall be awarded reasonable attorney's fees if * * * *

49 U.S.C. §15904(d)(2)

The district court shall award a reasonable attorney's fee as part of the damages for which a carrier is found liable under this subsection. The district court shall tax and collect that fee as a part of the costs of the action.

Transportation
49 U.S.C. §32508 (bumper standards)

The court shall award costs and a reasonable attorney's fee to the owner when a judgment is entered for the owner.

49 U.S.C. §32710(b) (odometers)

The court shall award costs and a reasonable attorney's fee to the person when a judgment is entered for that person.

Foreign Intelligence Surveillance Act of 1978
50 U.S.C. §1810

An aggrieved person * * * shall be entitled to recover * * * reasonable attorney's fees * * * *

50 U.S.C. §1828

An aggrieved person * * * whose premises, property, information, or material has been subjected to a physical search within the United States, or about whom information obtained by such a physical search has been disclosed or used in violation of section 307 shall have a cause of action against any person who committed such violation and shall be entitled to recover—(1) actual damages * * *; (2) punitive damages; and (3) reasonable attorney's fees and other investigative and litigation costs reasonably incurred.

II. STATUTORY PROVISIONS THAT EXPLICITLY GIVE COURTS DISCRETION TO AWARD FEES TO A PREVAILING PARTY

Government Employee Rights Act of 1991
2 U.S.C. §1220(e)

If the individual referred to in subsection (a) is the prevailing party in a proceeding under this section, attorney's fees maybe allowed by the court in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

Congressional Accountability Act of 1995
2 U.S.C. §1361(a)

If a covered employee, with respect to any claim under this chapter, or a qualified person with a disability, with respect to any claim under section 1331 of this title, is a prevailing party in any proceeding under section 1405, 1406, 1407, or 1408 of this title, the hearing officer, Board, or court, as the case may be, may award attorney's fees, expert fees, and any other costs as would be appropriate if awarded under section 2005e-5(k) of Title 42.

Presidential and Executive Office Accountability Act
3 U.S.C. §435(a) (see also, 28 U.S.C. §3905(a))

If a covered employee, with respect to any claim under this chapter, or a qualified person with a disability, with respect to any claim under section 421 [making sections of the Americans with Disabilities Act of 1990 applicable to the White House and specified other executive facilities], is a prevailing party in any proceeding under section 45[illegible]1), the administrative agency may award attorney's fees, expert fees, and other costs as would be appropriate if awarded under section 706(k) of the Civil Rights Act of 1964.

Freedom of Information Act
5 U.S.C. §552(a)(4)(E)(i)

The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

5 U.S.C. §552(a)(4)(E)(ii)
(added by P.L. 110-175 (2007))

For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained judicial relief through either—(I) a judicial order, or an enforceable written agreement or consent decree; or (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

Privacy Act
5 U.S.C. §552a(g)(2)(B)

The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

5 U.S.C. §552a(g)(3)(B)

The court may assess against the United States reasonable attorney fees and other litigation costs

reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

Government in the Sunshine Act
5 U.S.C. §552b(i)

The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (g) or (h) of this section, except that costs may be assessed against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes. In the case of assessment of costs against an agency, the costs may be assessed by the court against the United States.

Whistleblower Protection Act of 1989
5 U.S.C. §1204(m)(1)

[T]he Board, or an administrative law judge or other employee of the Board designated to hear a case arising under section 1215, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel

practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

5 U.S.C. §1204(m)(2)

If an employee or applicant for employment is the prevailing party of a case arising under section 1215 and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

Civil Service Reform Act of 1978
5 U.S.C. §5596(b)(1)

An employee of an agency who * * * is found * * * to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—(A) is entitled, on correction of the personnel action, to receive * * * (ii) reasonable attorney fees related to the personnel action which * * * shall be awarded in accordance with standards established under section 7701(g) of this title.

5 U.S.C. §7701(g)

(1) Except as provided in paragraph (2) of this subsection, the Board * * * may require payment by the agency involved of reasonable attorney fees incurred

by the employee or applicant for employment if the employee or applicant for employment is the prevailing party and the Board * * * determines that payment by the agency is warranted in the interest of justice * * * *

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706k of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

Agricultural Unfair Trade Practices
7 U.S.C. §2305(a)

In any action commenced pursuant hereto, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

7 U.S.C. §2305(c)

In any action commenced pursuant to this subsection, the court may allow the prevailing party a reasonable attorney's fee as a part of the costs.

Plant Variety Act
7 U.S.C. §2565

The court in exceptional cases may award reasonable attorney fees to the prevailing party.

7 U.S.C. §2570(b)

Such remedies include * * * attorney fees under section 2565 of this title.

Immigration and Nationality Act
8 U.S.C. §1324b(h)

In any complaint respecting an unfair immigration-related employment practice, an administrative law judge, in the judge's discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact.

8 U.S.C. §1324b(j)(4)

In any judicial proceeding under subsection (i) of this section or this subsection, the court, in its discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee as part of the costs but only if the losing party's argument is without reasonable foundation in law and fact.

Real Estate Settlement Procedures Act
12 U.S.C. §2607(d)(5)

In any private action brought pursuant to this subsection, the court may award to the prevailing party the court costs of the action together with reasonable attorneys fees.

Financial Institutions Anti-Fraud Enforcement Act of 1990
12 U.S.C. §4246 (see also, 18 U.S.C. §3059A(e)(2))

When the United States, through private counsel retained under this subchapter, prevails in any civil action, the court, in its discretion, may allow the United States reasonable attorney's fees and other expenses of litigation as part of the costs.

Clayton Act
15 U.S.C. §15c(d)(2)

[T]he court may, in its discretion, award a reasonable attorney's fee to a prevailing defendant upon a finding that the State attorney general has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

Lanham (Trademark) Act
15 U.S.C. §1117(a)

The court in exceptional cases may award reasonable attorney fees to the prevailing party.

Magnuson-Moss Warranty Act
15 U.S.C. §2310(d)(2)

If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) * * * unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

Telemarketing and Consumer Fraud Abuse and Prevention Act
15 U.S.C. §6104(d)

The court, in issuing any final order in any action brought under subsection (a), may award costs of suit and reasonable fees for attorneys and expert witnesses to the prevailing party.

CAN-SPAM Act of 2003 (P.L. 108-187)
15 U.S.C. §7706(f)(4)

In the case of any successful action under paragraph (1), the court, in its discretion, may award the costs of the action and reasonable attorney fees to the State.

National Historic Preservation Act
16 U.S.C. §470w-4

In any civil action brought in any United States district court by any interested person to enforce the provisions of sections 470 to 470a, 470b, and 470c to 470w-6 of this title, if such person substantially prevails in such action, the court may award attorneys' fees, expert witness fees, and other costs of participating in such action, as the court deems reasonable.

Copyright Act
17 U.S.C. §505

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

17 U.S.C. §911(f)

In any civil action arising under this chapter, the court in its discretion may allow the recovery of full costs, including reasonable attorneys' fees, to the prevailing party.

17 U.S.C. §1009(c)

In an action under subsection (a), the court * * * (4) in its discretion may award a reasonable attorney's fee to the prevailing party.

17 U.S.C. §1203(b)(5)

In an action brought under subsection (a), the court * * * in its discretion may award reasonable attorney's fees to the prevailing party.

17 U.S.C. §1323(d)

In an action for infringement under this chapter, the court may award reasonable attorney's fees to the prevailing party.

Gun Control Act of 1968
18 U.S.C. §925A

In any action under this section, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

Electronic Communications Privacy Act of 1986
18 U.S.C. §2707(c)

In the case of a successful action to enforce liability under this section, the court may assess the costs of the action, together with reasonable attorney fees determined by the court.

Criminal Justice Act
18 U.S.C. §3006A note

[T]he [federal] court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) * * * may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code * * * *

Mexican-American Chamizal Convention Act of 1964
22 U.S.C. §227d-2

The Commissioner, in rendering an award in favor of any claimant under section 277d-19 of this title, may, as part of such award, determine and allow reasonable attorneys' fees which shall not exceed 10 per centum of the amount awarded, to be paid out of but not in addition to the amount of award, to the attorneys representing the claimant.

Foreign Service Act of 1980
22 U.S.C. §4137(b)

If the Board finds that the grievance is meritorious, the Board shall have the authority to direct the Department—(5) to pay reasonable attorney fees to the grievant to the same extent and in the same manner as such fees may be required by the Merit Systems Protection Board under section 7701(g) of Title 5.

Internal Revenue Code
26 U.S.C. §6110(f)(4)(A)

Any person who has exhausted the administrative remedies prescribed pursuant to paragraph (2) with respect to a request for disclosure may file a petition in the United States Tax Court or a complaint in the United States District Court for the District of Columbia * * * * [T]he provisions of subparagraphs (C), (D), (E), (F), and (G) of section 552(a)(4) of title 5, United States Code, shall apply to any proceeding under this paragraph.

26 U.S.C. §7431(c)(3)

[I]n the case of a plaintiff which is described in section 7430(c)(4)(A)(ii), reasonable attorneys fees, except that if the defendant is the United States, reasonable attorneys fees may be awarded only if the plaintiff is the prevailing party * * * *

Jury System Improvements Act of 1978
28 U.S.C. §1875(d)(2)

In any action or proceeding under this section, the court may award a prevailing employee who brings such action by retained counsel a reasonable attorney's fee as part of the costs. The court may tax a defendant employer, as costs payable to the court, the attorney fees and expenses incurred on behalf of a prevailing employee, where such costs were expended pursuant to paragraph (1) of this subsection. The court may award a prevailing employer a reasonable attorney's fee as part of the costs only if the court determines that the action is frivolous, vexatious, or brought in bad faith.

Fees and Costs
28 U.S.C. §1912 (see, 50 ALR Fed 652, 67 ALR Fed 319)

Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

Equal Access to Justice Act
28 U.S.C. §2412 (see also, 5 U.S.C. §504)

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded

pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States * * * * The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

Presidential and Executive Office Accountability Act (see also, 3 U.S.C. §435)
28 U.S.C. §3905(a)

If a covered employee, with respect to any claim under chapter 5 of title 3, or a qualified person with a disability, with respect to any claim under section 421 of title 3, is a prevailing party in any proceeding under section 1296 or section 1346(g), the court may award attorney's fees, expert fees, and other costs as would be appropriate if awarded under section 706(k) of the Civil Rights Act of 1964.

Assumption of Contractual Obligations Related to Transfers of Rights in Motion Pictures
28 U.S.C. §4001(g)

[T]he court in its discretion may allow recovery of full costs by or against any party and may also award a reasonable attorney's fees to the prevailing party as part of the costs.

Labor-Management Reporting and Disclosure Act of 1959
29 U.S.C. §431(c)

The court in such action may, in its discretion, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

Rehabilitation Act of 1973
29 U.S.C. §794a(b)

In any action or proceeding to enforce or charge a violation of a provision of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Employee Retirement Income Security Act
29 U.S.C. §1370(e)

(1) General Rule.—In any action brought under this section, the court in its discretion may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to any party who prevails or substantially prevails in such action.

(2) Exemption for Plans.—Notwithstanding the preceding provisions of this subsection, no plan shall be required in any action to pay any costs and expenses (including attorney's fees).

29 U.S.C. §1451(e)

In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party.

Employee Polygraph Protection Act of 1988
29 U.S.C. §2005(c)(3)

The court, in its discretion, may allow the prevailing party (other than the United States) reasonable costs, including attorney's fees.

Worker Adjustment and Retraining Notification Act
29 U.S.C. §2104(a)(6)

In any such suit, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

General Accounting Office Act of 1980
31 U.S.C. §755(b)

If an officer, employee, applicant for employment, or employee of the Architect of the Capitol, the Botanic Garden, or the Senate Restaurants is the prevailing party in a proceeding under this section, and the decision is based on a finding of discrimination prohibited under section 732(f) of this title or section 312(e)(2) of the Architect of the Capitol Human

Resources Act, attorney's fees may be allowed by the court in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 [42 U.S.C. §2000e-5(k)].

Debt Collection Improvement Act of 1996
31 U.S.C. §3730(d)(4)

[T]he court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

Local Partnership Act
31 U.S.C. §6716(c)

In an action under this section, the court * * * to enforce compliance with section 6711(a) or (b), may allow a prevailing party (except the United States Government) a reasonable attorney's fee.

Water Pollution Prevention and Control Act
33 U.S.C. §1365(d)

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate.

33 U.S.C. §1369(b)(3)

In any judicial proceeding under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party whenever it determines that such award is appropriate.

Patent Infringement
35 U.S.C. §285

The court in exceptional cases may award reasonable attorney fees to the prevailing party.

35 U.S.C. §271(e)(4)

The remedies prescribed by subparagraphs (A), (B), and (C) are the only remedies which may be granted by a court for an act of infringement described in paragraph (2), except that a court may award attorney fees under section 285.

35 U.S.C. §296(b)

Such remedies include * * * attorney fees under [35 U.S.C.] section 285 * * * *

Uniformed Services Employment and Reemployment Rights Act of 1994
38 U.S.C. §4323(c)(2)(B)

In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(2) who

obtained private counsel for such action or proceeding, the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses.

National Childhood Vaccine Injury Act of 1986
42 U.S.C. §300aa-31(c)

The court, in issuing any final order in any action under this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any plaintiff who substantially prevails on one or more significant issues in the action.

Social Security Act Amendments of 1965
42 U.S.C §406(b)(1)

Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Commissioner of Social Security may, notwithstanding the provisions of section 405(i) of this title, but subject to subsection (d) of this section, certify the amount of such fee for payment to such

attorney out of, and not in addition to, the amount of such past-due benefits.

Voting Rights Act of 1965
42 U.S.C. §1973*l*(e)

In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, reasonable expert fees, and other reasonable litigation expenses, as part of the costs.

National Voter Registration Act of 1993
42 U.S.C. §1973gg-9(c)

In a civil action under this section, the court may allow the prevailing party (other than the United States) reasonable attorney fees, including litigation expenses, and costs.

Civil Rights Attorney's Fees Awards Act of 1976
42 U.S.C. §1988(b)

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of P.L. 92-318, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, or section 40302 of the Violence Against Women Act of 1994, the court, in its discretion, may allow the prevailing party, other than

the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

Civil Rights of Institutionalized Persons Act
42 U.S.C. §1997a(b)

In any action commenced under this section, the court may allow the prevailing party, other than the United States, a reasonable attorney's fee against the United States as part of the costs.

42 U.S.C. §1997c(d)

In any action in which the United States joins as an intervenor under this section, the court may allow the prevailing party, other than the United States, a reasonable attorney's fee against the United States as part of the costs * * * *

Civil Rights Act of 1964, Title II
42 U.S.C. §2000a-3(b)

In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the

United States shall be liable for costs the same as a private party.

Civil Rights Act of 1964, Title III
42 U.S.C. §2000b-1

In any action or proceeding under this subchapter the United States shall be liable for costs, including a reasonable attorney's fee, the same as a private party.

Civil Rights Act of 1964, Title VII
42 U.S.C. §2000e-5(k)

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the [Equal Employment Opportunity] Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Fair Housing Act
42 U.S.C. §3612(p)

In any administrative proceeding brought under this section, or any court proceeding arising therefrom, or any civil action under section 812 [42 U.S.C. §3612], the administrative law judge or the court, as the case may be, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be

liable for such fees and costs to the extent provided by section 504 of title 5, United States Code, or by section 2412 of title 28, United States Code.

42 U.S.C. §3613(c)(2)

In a civil action under subsection (a), the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person.

42 U.S.C. §3614(d)(2)

In a civil action [by the Attorney General] under this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the extent provided by section 2412 of title 28, United States Code.

Omnibus Crime Control and Safe Streets Act of 1968
42 U.S.C. §3789d(c)(4)(B)

In any civil action brought by a private person to enforce compliance with any provision of this subsection, the court may grant to a prevailing plaintiff reasonable attorney fees, unless the court determines that the lawsuit is frivolous, vexatious, brought for

harassment purposes, or brought principally for the purpose of gaining attorney fees.

Solid Waste Disposal Act
42 U.S.C. §6972(e)

The court, in issuing any final order in any action brought pursuant to this section or section 7006 [42 U.S.C. §6976], may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines that such award is appropriate.

Comprehensive Environmental Response, Compensation, and Liability Act
42 U.S.C. §9659(f)

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate.

42 U.S.C. §11046(f)

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially

prevailing party whenever the court determines such an award is appropriate.

Americans with Disabilities Act
42 U.S.C. §12205

In any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

Cable Communications Policy Act of 1984
47 U.S.C. §553(c)(2)

The court may * * * direct the recovery of full costs, including awarding reasonable attorneys' fees to an aggrieved party who prevails.

47 U.S.C. §605(e)(3)(B)

The court may * * * direct the recovery of full costs, including awarding reasonable attorneys' fees to an aggrieved party who prevails.

ICC Termination Act of 1995
49 U.S.C. §14707(c)

In a civil action under subsection (a), the court may determine the amount of and award a reasonable attorney's fee to the prevailing party. That fee is in addition to costs allowable under the Federal Rules of Civil Procedure.

Transportation
49 U.S.C. §42121(b)(3)(C)
(whistleblower protection)

If the Secretary of Labor finds that a complaint under paragraph (1) is frivolous or has been brought in bad faith, the Secretary of Labor may award to the prevailing employer a reasonable attorney's fee not exceeding $ 1,000.

49 U.S.C. §60121(b) (pipelines)

The court may award costs, reasonable expert witness fees, and a reasonable attorney's fee to a prevailing plaintiff in an action under this section. The court may award costs to a prevailing defendant when the action is unreasonable, frivolous, or meritless.

III. STATUTORY PROVISIONS THAT ALLOW FOR FEE SHIFTING AT THE COURT'S OR AGENCY'S DISCRETION WITHOUT MENTION OF A REQUIREMENT OF SUCCESS.

Ethics in Government Act of 1978
2 U.S.C. §288i(d)

The Senate may by resolution authorize the reimbursement of any Member, officer, or employee of the Senate who is not represented by the [Senate Legal] Counsel for fees and costs, including attorneys' fees, reasonably incurred in obtaining representation. Such reimbursement shall be from funds appropriated to the contingent fund of the Senate.

Federal Contested Elections Act
2 U.S.C. §396

The committee [on House Administration of the House of Representatives] may allow any party reimbursement from the contingent fund of the House of Representatives of his reasonable expenses of the contested election case, including reasonable attorneys fees * * * *

Home Owners' Loan Act
12 U.S.C. §1464(d)(1)(B)(vii)

Any court having jurisdiction of any proceeding instituted under this section by a savings association, or a director or officer thereof, may allow to any such

party reasonable expenses and attorneys' fees. Such expenses and fees shall be paid by the savings association.

Housing Act of 1959
12 U.S.C. §1701q-1(f)

The monetary judgment may, in the court's discretion, include the attorneys fees and other expenses incurred by the United States in connection with the action.

National Housing Act
12 U.S.C. §1723i(e)
(action to collect civil money penalty)

The monetary judgment may, in the discretion of the court, include any attorneys fees and other expenses incurred by the United States in connection with the action.

12 U.S.C. §1735f-14(e)
(action to collect civil money penalty)

The monetary judgment may, in the court's discretion, include the attorneys fees and other expenses incurred by the United States in connection with the action.

12 U.S.C. §1735f-15(f)
(action to collect civil money penalty)

The monetary judgment may, in the court's discretion, include the attorneys fees and other expenses incurred by the United States in connection with the action.

Federal Credit Union Act
12 U.S.C. §1786(p)

Any court having jurisdiction of any proceeding instituted under this section by any credit union or a director, officer, or committee member thereof, may allow to any party such reasonable expenses and attorneys' fees as it deems just and proper, and such expenses and fees shall be paid by the credit union or from its assets.

Federal Deposit Insurance Act
12 U.S.C. §1818(n)

Any court having jurisdiction of any proceeding instituted under this section by an insured bank or director or officer thereof, may allow to any such party such reasonable expenses and attorneys' fees as it deems just and proper; and such expenses and fees shall be paid by the bank or from its assets.

Bank Holding Company Act
12 U.S.C. §1844(f)

Any court having jurisdiction of any proceeding instituted under this subsection may allow to any such party such reasonable expenses and attorneys' fees as it deems just and proper.

Farm Credit Amendments Act of 1985
12 U.S.C. §2273

Any court having jurisdiction of any proceeding instituted under this part by a System institution or a director or officer thereof, may allow to any such party such reasonable expenses and attorneys' fees as it deems just and proper; and such expenses and fees shall be paid by the System institution or from its assets.

International Banking Act of 1978
12 U.S.C. §3108(b)(5)

Any court having jurisdiction of any proceeding instituted under this subsection may allow any party to such proceeding such reasonable expenses and attorneys' fees as the court deems just and proper.

Securities Act of 1933
15 U.S.C. §77k(e)

In any suit under this or any other section of this subchapter the court may, in its discretion, require an

undertaking for the payment of the costs of such suit, including reasonable attorney's fees * * * *

Trust Indenture Act
15 U.S.C. §77ooo(e)

The indenture to be qualified may contain provisions to the effect that all parties thereto, including the indenture security holders, agree that the court may in its discretion * * * assess reasonable costs, including reasonable attorneys' fees, against any party litigant * * * *

15 U.S.C. §77www(a)

[T]he court may, in its discretion * * * assess reasonable costs, including reasonable attorneys' fees, against either party litigant * * * *

Securities Exchange Act of 1934
15 U.S.C. §78i(e)

In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

15 U.S.C. §78r(a)

In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

Consumer Product Safety Act
15 U.S.C. §2060(c)

A court may in the interest of justice include in such relief an award of the costs of the suit, including reasonable attorneys' fees (determined in accordance with subsection (f) of this section) and reasonable expert witnesses' fees. Attorneys' fees may be awarded against the United States (or any agency or official of the United States) without regard to section 2412 of title 28 or any other provision of law.

15 U.S.C. §2073

In any action under this section the court may in the interest of justice award the costs of suit, including reasonable attorneys' fees (determined in accordance with section 2060(f) of this title) and reasonable expert witnesses' fees.

Hobby Protection Act
15 U.S.C. §2102

In any such action, the court may award the costs of the suit, including reasonable attorneys' fees.

Toxic Substances Control Act
15 U.S.C. §2618(d)

The decision of the court in an action commenced under subsection (a), or of the Supreme Court of the United States on review of such a decision, may include an award of costs of suit and reasonable fees for attorneys and expert witnesses if the court determines that such an award is appropriate.

15 U.S.C. §2619(c)(2)

The court in issuing any final order in any action brought pursuant to subparagraph (a) may award costs of suit and reasonable fees for attorneys and expert witnesses if the court determines that such an award is appropriate. Any court, in issuing its decision in an action brought to review such an order, may award costs of suit and reasonable fees for attorneys if the court determines that such an award is appropriate.

15 U.S.C. §2620(b)(4)(C)

The court in issuing any final order in any action brought pursuant to subparagraph (A) may award

costs of suit and reasonable fees for attorneys and expert witnesses if the court determines that such an award is appropriate. Any court, in issuing its decision in an action brought to review such an order, may award costs of suit and reasonable fees for attorneys if the court determines that such an award is appropriate.

CAN-SPAM Act of 2003
15 U.S.C. §7706(g)(4)

In any action brought pursuant to paragraph (1), the court may, in its discreation, requiring an undertaking for the payment of the costs of such action, and assess reasonable costs, including reasonable attorneys' fees, against any party.

Endangered Species Act
16 U.S.C. §1540(g)(4)

The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

Video Privacy Protection Act of 1988
18 U.S.C. §2710(c)(2)(C)

The court may award * * * reasonable attorneys' fees and other litigation costs reasonably incurred.

Driver's Privacy Protection Act of 1994
18 U.S.C. §2724(b)(3)

The court may award * * * reasonable attorneys' fees and other litigation costs reasonably incurred.

Individuals with Disabilities Education Act
20 U.S.C. §1415(i)(3)

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs * * * *

Employee Retirement Income Security Act
29 U.S.C. §1132(g)(1)

In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

Surface Mining Control and Reclamation Act
30 U.S.C. §1270(d)

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

30 U.S.C. §1275(e)

Whenever an order is issued under this section, or as a result of any administrative proceeding under this chapter, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) * * * may be assessed against either party * * * *

Deep Seabed Hard Mineral Resources Act
30 U.S.C. §1427(c)

The court, in issuing any final order in any action brought under subsection (a) of this section, may award costs of litigation, including reasonable attorney and expert witness fees, to any party whenever the court determines that such an award is appropriate.

Marine Protection, Research, and Sanctuaries Act
33 U.S.C. §1415(g)(4)

The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

Deepwater Ports Act
33 U.S.C. §1515(d)

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

Act to Prevent Pollution from Ships
33 U.S.C. §1910(d)

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party including the Federal Government.

Safe Drinking Water Act
42 U.S.C. §300j-8(d)

The court, in issuing any final order in any action brought under subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such an award is appropriate.

United States Housing Act of 1937
42 U.S.C. §1437d(q)(7)

Appropriate relief that may be awarded by such district courts shall include reasonable attorney's fees and other litigation costs.

Privacy Protection Act of 1980
42 U.S.C. §2000aa-6(f)

A person having a cause of action under this section shall be entitled to recover * * * such reasonable attorneys' fees and other litigation costs reasonably incurred as the court, in its discretion, may award * * * *

Noise Control Act of 1972
42 U.S.C. §4911(d)

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable

attorney and expert witness fees) to any party, whenever the court determines such an award is appropriate.

Energy Reorganization Act of 1974
42 U.S.C. §5851(e)(2)

The court, in issuing any final order under this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

Energy Policy and Conservation Act
42 U.S.C. §6305(d)

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

Clean Air Act
42 U.S.C. §7604(d)

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

42 U.S.C. §7607(f)

In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

42 U.S.C. §7622(e)(2)

The court, in issuing any final order under this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

Power Plant and Industrial Fuel Use Act
42 U.S.C. §8435(d)

The court, in issuing any final order in any action brought under subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

Ocean Thermal Energy Conservation Act of 1980
42 U.S.C. §9124(d)

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable

attorney and expert witness fees) to any party whenever the court determines that such an award is appropriate.

Outer Continental Shelf Lands Act
43 U.S.C. §1349(a)(5) (see also, 43 U.S.C. §1845(e))

A court, in issuing any final order in any action brought pursuant to subsection (a)(1) or subsection (c) of this section, may award costs of litigation, including reasonable attorney and expert witness fees, to any party, whenever such court determines such award is appropriate.

Transportation
49 U.S.C. §42121(b)(6)(B)

The court, in issuing any final order under this paragraph, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

IV. MISCELLANEOUS FEE SHIFTING PROVISIONS

Whistleblower Protection Act of 1989
5 U.S.C. §1214(g)

If the Board orders corrective action under this section, such corrective action may include * * * (2) reimbursement for attorney's fees * * * *

Federal Employment Compensation for Work Injuries
5 U.S.C. §8127

(b) A claim for legal or other services furnished in respect to a case, claim, or award for compensation under this subchapter is valid only if approved by the Secretary.

Animal Welfare Act
7 U.S.C. §2157(d)

It shall be unlawful for any member of an Institutional Animal Committee to release any confidential information of the research facility * * * * Any person, including any research facility, injured in its business or property by reason of a violation of this section may recover all actual and consequential damages sustained by such person and the cost of the suit including a reasonable attorney's fee.

Federal Erroneous Retirement Coverage Corrections Act
5 U.S.C. §8331 note

The Director of the Office of Personnel Management may * * * (2) provide for the reimbursement of necessary and reasonable expenses incurred by an individual with respect to settlement of a claim for losses resulting from a retirement coverage error, including attorney's fees, court costs, and other actual expenses * * * *

Gonzales Act
10 U.S.C. §1089(f)(2)

With respect to the Secretary of Defense and the Armed Forces Retirement Home Board, the authority provided by paragraph (1) also includes the authority to provide for reasonable attorney's fees for persons described in subsection (a), as determined necessary pursuant to regulations prescribed by the head of the agency concerned.

Whistleblower Protections for Contractor Employees of Department of Defense, Coast Guard, and National Aeronautics and Space Administration
10 U.S.C. §2409(c)(1)

[T]he head of the agency * * * shall take one or more of the following actions: * * * (C) Order the contractor to pay the complainant an amount equal to the aggregate of all costs and expenses (including attorneys'

fees and expert witnesses' fees) that were reasonably incurred * * * *

Bankruptcy Act (as amended by P.L. 109-8 (2005))
11 U.S.C. §303(i)

[T]he court may grant judgment—(1) against the petitioners and in favor of the debtor for—(B) a reasonable attorney's fee * * * *

11 U.S.C. §330(a)(1)

[T]he court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103—(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by such person.

11 U.S.C. §363(n)

The trustee may * * * recover any costs, attorneys' fees or expenses incurred in avoiding such sale or recovering such amount.

11 U.S.C. §523(d)

[T]he court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for,

the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

11 U.S.C. §707(b)(4)(A)

The court * * * may order the attorney for the debtor to reimburse the trustee for all reasonable costs in prosecuting a motion filed under section 707(b), including reasonable attorneys' fees * * * *

11 U.S.C. §707(b)(5)(A)

[T]he court * * * may award a debtor all reasonable costs (including reasonable attorneys' fees) in contesting a motion filed by a party in interest * * * *

National Housing Act
12 U.S.C. §1715k(h)(6)

In cases of defaults on loans insured under this subsection * * * the Secretary * * * may acquire the loan and any security therefor upon * * * reimbursement for such collection costs, court costs, and attorney fees as may be approved by the Secretary.

Clayton Act
15 U.S.C. §15(b)(1)

[A]ny person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. §35(a)

No damages, interest on damages, costs, or attorney's fees may be recovered under section 15, 15a, or 15c of this title from any local government, or official or employee thereof acting in an official capacity.

15 U.S.C. §36(a)

No damages, interest on damages, costs or attorney's fees may be recovered under section 15, 15a, or 15c of this title in any claim against a person based on any official action directed by a local government, or official or employee thereof acting in an official capacity.

Securities Act of 1933
15 U.S.C. §77z-1(a)(6) (see also, §77z-1(a)(7)(C), (c)(3))

Total attorney's fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.

Interstate Land Sales Full Disclosure Act
15 U.S.C. §1709(c)

The amount recoverable in a suit authorized by this section may include * * * reasonable amounts for attorneys' fees.

15 U.S.C. §1717a(d)

The monetary judgment may, in the discretion of the court, include any attorneys fees and other expenses incurred by the United States in connection with the action.

Consumer Product Safety Act
15 U.S.C. §2072(a)

Any person who shall sustain injury by reason of any knowing (including willful) violation of a consumer product safety rule * * * may, if the court determines it to be in the interest of justice, recover the costs of suit, including reasonable attorneys' fees (determined in accordance with section 2060(f) of this title) and reasonable expert witnesses' fees * * * *

Magnuson-Moss Warranty Act
15 U.S.C. §2805(d)(3)

If any action under subsection (a), the court may, in its discretion, direct that reasonable attorney and

expert witness fees be paid by the franchisee if the court finds that such action is frivolous.

National Cooperative Research Act of 1984
15 U.S.C. §4304(b)

The award made under subsection (a) may be offset in whole or in part by an award in favor of any other party for any part of the cost of suit, including a reasonable attorney's fee, attributable to conduct during the litigation by any prevailing party that the court finds to be frivolous, unreasonable, without foundation, or in bad faith.

Condominium and Cooperative Abuse Relief Act of 1980
15 U.S.C. §3608(d)

Such relief may include, but shall not be limited to rescission, reformation, restitution, the award of damages and reasonable attorney fees and court costs. A defendant may recover reasonable attorneys' fees if the court determines that the cause of action filed by the plaintiff is frivolous, malicious, or lacking in substantial merit.

15 U.S.C. §3611(d)

The amount recoverable under this section may include interest paid, reasonable attorneys' fees, independent engineer and appraisers' fees, and court

costs. A defendant may recover reasonable attorneys' fees if the court determines that the cause of action filed by the plaintiff is frivolous, malicious, or lacking in substantial merit.

Export Trading Company Act of 1982
15 U.S.C. §4016(b)(1)

Any person who has been injured as a result of conduct engaged in under a certificate of review may bring a civil action for injunctive relief, actual damages, the loss of interest on actual damages, and the cost of suit (including a reasonable attorney's fee) for failure to comply with the standards of section 303(a) [15 U.S.C. §4013(a)].

Federal Power Act
16 U.S.C. §825q-1(b)(2)

The Commission may, under rules promulgated by it, provide compensation for reasonable attorney's fees, expert witness fees, and other costs of intervening or participating in any proceeding before the Commission to any person whose intervention or participation substantially contributed to the approval, in whole or in part, of a position advocated by such person.

Copyright Act
17 U.S.C. §511(b)

Such remedies include * * * costs and attorney's fees under section 505 * * * *

17 U.S.C. §512(k)

As used in this section, the term 'monetary relief' means damages, costs, attorneys' fees, and any other form of monetary payment.

17 U.S.C. §911(g)(2)

Such remedies include * * * costs and attorney's fees under subsection (f).

17 U.S.C. §1322(b)

A seller or distributor who suffers damage * * * may recover such relief as may be appropriate, including * * * reasonable attorney's fees.

17 U.S.C. §1325

That amount shall be to compensate the defendant and shall be charged against the plaintiff and paid to the defendant, in addition to such costs and attorney's fees of the defendant as may be assessed by the court.

PROTECT Act
18 U.S.C. §2252A(f)

Any person aggrieved by reason of the conduct prohibited under subsection (a) or (b) [of 18 U.S.C. §2252A] or section 1466A may commence a civil action for * * * (A) temporary, preliminary, or permanent injunctive relief; (B) compensatory and punitive damages; and (C) the costs of the civil action and reasonable fees for attorneys and expert witnesses.

Anti-counterfeiting Amendments Act of 2004
18 U.S.C. §2318(f)

(1) * * * Any copyright owner who is injured, or is threatened with injury, by a violation of subsection (a) may bring a civil action in an appropriate United States district court * * * * In any action brought under paragraph (1), the court * * * may award to the injured party—(i) reasonable attorney fees and costs.

Wire Interception Act
18 U.S.C. §2520(b)(3)

In any action under this section, appropriate relief includes * * * a reasonable attorney's fee and other litigation costs reasonably incurred.

Electronic Communications Privacy Act of 1986
18 U.S.C. §2707(b)(3)

In a civil action under this section, appropriate relief includes * * * a reasonable attorney's fee and other litigation costs reasonably incurred.

Juvenile Delinquency
18 U.S.C. §5034

In cases where the juvenile and his parents, guardian, or custodian are financially able to obtain adequate representation but have not retained counsel, the magistrate may assign counsel and order the payment of reasonable attorney's fees or may direct the juvenile, his parents, guardian, or custodian to retain private counsel within a specified period of time.

Indian Arts and Crafts Act of 1990
25 U.S.C. §305e(b)

In addition to the relief specified in subsection (a), the court may award punitive damages and the costs of suit and a reasonable attorney's fee.

American Indian Agricultural Resource Management Act
25 U.S.C. §3713(a)(1)(C)

[T]he Secretary [of the Interior] shall issue regulations that * * * establish civil penalties for the commission

of trespass on Indian agricultural lands, which provide for * * * court costs, and attorney fees.

Internal Revenue Code
26 U.S.C. §6673(a)(2)

Whenever it appears to the Tax Court that any attorney or other person admitted to practice before the Tax Court has multiplied the proceedings in any case unreasonably and vexatiously, the Tax Court may require—(A) that such attorney or other person pay personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct, or (B) if such attorney is appearing on behalf of the Commissioner of Internal Revenue, that the United States pay such excess costs, expenses, and attorneys' fees in the same manner as such an award by a district court.

Judicial Discipline and
Removal Reform Act of 1990
28 U.S.C. §372(c)(16)

Upon the request of a judge or magistrate whose conduct is the subject of a complaint under this subsection, the judicial council may, if the complaint has been finally dismissed under paragraph 6(C), recommend that the Director of the Administrative Office of the United States Courts award reimbursement, from funds appropriated to the Federal judiciary, for those reasonable expenses, including attorneys' fees, incurred

by that judge or magistrate during the investigation which would not have been incurred but for the requirements of this subsection.

Independent Counsel Reauthorization Act of 1987
28 U.S.C. §593(f)(1) (see also, 5 U.S.C. §288i(d))

Upon the request of an individual who is the subject of an investigation conducted by an independent counsel pursuant to this chapter, the division of the court may, if no indictment is brought against such individual pursuant to that investigation, award reimbursement for those reasonable attorney's fees incurred by that individual * * * *

Judicial Improvements and Access to Justice Act
28 U.S.C. §655(e)

In any trial de novo demanded under subsection (a) in which arbitration was done by consent of the parties, a district court may assess costs, as provided in section 1920 of this title, and reasonable attorney fees against the party demanding the trial de novo if—(1) such party fails to obtain a judgment, exclusive of interest and costs, in the court which is substantially more favorable to such party than the arbitration award, and (2) the court determines that the party's conduct in seeking a trail de novo was in bad faith.

Removal of Cases from State Court
28 U.S.C. §1447(c)

An order remanding the case [back to state court, if the federal court lacks jurisdiction] may require payment of just costs and actual expenses, including attorney fees, incurred as a result of the removal.

U.S. Court of Federal Claims—Patent and Copyright Cases
28 U.S.C. §1498(a)

Reasonable and entire compensation shall include the owner's reasonable costs, including reasonable fees for expert witnesses and attorneys, in pursuing the action if the owner is an independent inventor, a nonprofit organization, or an entity that had no more than 500 employees at any time during the 5-year period preceding the use or manufacture of the patented invention by or for the United States. Notwithstanding the preceding sentences, unless the action has been pending for more than 10 years from the time of filing to the time that the owner applies for such costs and fees, reasonable and entire compensation shall not include such costs and fees if the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

Parental Kidnaping Prevention Act of 1980
28 U.S.C. §1738A note

In furtherance of the purposes of section 1738A of title 28 * * * State courts are encouraged to * * * award to the person entitled to custody or visitation * * * attorneys' fees * * * *

28 U.S.C. §1927

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Federal Debt Collection Procedures Act of 1990
28 U.S.C. §3205(c)(6)

The court may award a reasonable attorney's fee to the United States and against the garnishee if the writ is not answered within the time specified therein * * * *

Civil Asset Forfeiture Reform Act of 2000
28 U.S.C. §2465(b)(2)(C)

If there are multiple claims to the same property, the United States shall not be liable for costs and attorneys fees associated with any such claim if the

United States * * * (iii) does not cause the claimant to incur additional, reasonable costs or fees * * * *

28 U.S.C. §2465(b)(2)(D)

If the court enters judgment in part for the claimant and in part for the Government, the court shall reduce the award of costs and attorney fees accordingly.

Federal Rules of Civil Procedure
28 U.S.C. App. Rule 11(c)(2)

[T]he sanction may consist of, or include * * * an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

28 U.S.C. App. Rule 16(f)

[T]he judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

28 U.S.C. App. Rule 23(h)

In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement.

28 U.S.C. App. Rule 26(g)(3)

If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

28 U.S.C. App. Rule 30(g)(1)

If the party giving notice of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

28 U.S.C. App. Rule 30(g)(2)

If the party giving the notice of the taking of the deposition of a witness fails to serve a subpoena on him and the witness because of such failure does not

attend, and if another party attends in person or by attorney because that party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

28 U.S.C. App. Rule 37(a)(4)

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds * * * *

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds * * * *

28 U.S.C. App. Rule 37(b)(2)

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds * * * *

28 U.S.C. App. Rule 37(c)(1)

In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include * * * *

28 U.S.C. App. Rule 37(c)(2)

If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making the proof, including reasonable attorney's fees * * * *

28 U.S.C. App. Rule 37(d)

In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the

failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

28 U.S.C. App. Rule 37(g)

If a party or a party's attorney fails to participate in good faith in the development and submission of a discovery plan by agreement as required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

28 U.S.C. App. Rule 38

If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

28 U.S.C. App. Rule 56(g)

[T]he court shall forthwith order the party * * * to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees * * * *

28 U.S.C. App. Rule 68

If, more than ten days before trial begins, a party defending a claim makes a settlement offer which is rejected by the offeree, and, [i]f the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

Norris-LaGuardia Act
29 U.S.C. §107(e)

No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) * * * *

Labor-Management Reporting and Disclosure Act of 1959
29 U.S.C. §501(b)

The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit * * * *

Employee Retirement Income Security Act
29 U.S.C. §1305(b)(1)

Each fund established under this section shall be credited with the appropriate portion of * * * (F) attorney's fees awarded to the corporation * * * *

29 U.S.C. §1401(a)(2)

The arbitrator may also award reasonable attorney's fees.

Surface Mining Control and Reclamation Act
30 U.S.C. §1270(f)

Any person who is injured in his person or property through the violation by any operator of any rule, regulation, order, or permit issued pursuant to this chapter may bring an action for damages (including reasonable attorney and expert witness fees) * * * *

Federal Acquisition Streamlining Act of 1994
31 U.S.C. §3554(c)(1)

If the Comptroller General determines that a solicitation for a contract or a proposed award or the award of a contract does not comply with a statute or regulation, the Comptroller General may recommend that the Federal agency conducting the procurement pay to an appropriate interested party the costs of —(A) filing and pursuing the protest, including

reasonable attorneys' fees and consultant and expert witness fees * * * *

31 U.S.C. §3554(c)(2)

No party * * * may be paid, pursuant to a recommendation made under the authority of paragraph (1)—(A) costs for consultant and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Federal Government; or (B) costs for attorneys' fees that exceed $150 per hour unless the agency determines, based on the recommendation of the Comptroller General on a case by case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

Oil Pollution Act of 1990
33 U.S.C. §2715(c)

At the request of the Secretary, the Attorney General shall commence an action on behalf of the Fund to recover any compensation paid by the Fund to any claimant pursuant to this chapter, and all costs incurred by the Fund by reason of the claim, including * * * attorney's fees.

Federal Acquisition Streamlining Act of 1994
41 U.S.C. §265(c)(1)

If the head of an executive agency determines that a contractor has subjected a person to a reprisal prohibited by subsection (a), the head of the executive agency may * * * (C) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred * * * *

Public Readiness and Emergency Preparedness Act, Division C
(limits on liability for pandemic flu and medical biodefense countermeasures)
42 U.S.C. §247d-6d

Whenever a district court of the United States determines that there has been a violation of Rule 11 of the Federal Rules of Civil Procedure in an action under subsection (d), the court shall impose upon the attorney, law firm, or parties that have violated Rule 11 or are responsible for the violation, an appropriate sanction, which may include an order to pay the other party or parties for the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper that is the subject of the violation, including a reasonable attorney's fee. Such sanction shall be sufficient to deter repetition of such conduct or comparable conduct by others similarly situated,

and to compensate the party or parties injured by such conduct.

Safe Drinking Water Act
42 U.S.C. §300h-2(c)(7)

If any person fails to pay an assessment of a civil penalty * * * the Administrator may request the Attorney General to bring a civil action in an appropriate district court to recover the amount assessed (plus costs, attorneys' fees, and interest * * *).

National Childhood Vaccine Injury Act of 1986
42 U.S.C. §300aa-15(b)

Compensation awarded under the [National Vaccine Injury Compensation] Program * * * may also include an amount, not to exceed a combined total of $30,000, for—(1) lost earnings * * * (2) pain and suffering * * * , and (3) reasonable attorneys' fees and costs (as provided in subsection (e) of this section).

Social Security Act
42 U.S.C. §1320a-8(b)(4)(G)

The official conducting a hearing under this section may sanction a person, including any party or attorney * * * * Such sanction may include * * * ordering the party or attorney to pay the attorneys' fees and other costs caused by the failure or misconduct * * * *

Civil Money Penalties Against Section 8 Owners
42 U.S.C. §1437z-1(e)(1)(B)

Any monetary judgment awarded in an action brought under this paragraph may, in the discretion of the court, include the attorney's fees and other expenses incurred by the United States in connection with the action.

Housing Act of 1949
42 U.S.C. §1490s(b)(5)(A)

The monetary judgment may, in the court's discretion, include the attorney's fees and other expenses incurred by the United States in connection with the action.

Voting Accessibility for the Elderly and Handicapped Act
42 U.S.C. §1973ee-4(c)

Notwithstanding any other provision of law, no award of attorney fees may be made with respect to an action under this section, except in any action brought to enforce the original judgment of the court.

Civil Rights Act of 1991
42 U.S.C. §1988(c)

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the

court, in its discretion, may include expert fees as part of the attorney's fee.

Civil Rights of Institutionalized Persons Act
42 U.S.C. §1997e(d)

In an action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that * * * *

Civil Rights Act of 1964, Title VII
42 U.S.C. §2000e-5(g)(2)(B)

On a claim in which an individual proves a violation under section 703(m) [42 U.S.C. §2000e-2(m)] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of the claim under section 703(m) * * * *

Atomic Energy Act of 1954
42 U.S.C. §2184

If, in any action against such patent licensee, the court shall determine that the defendant is exercising such license, the measure of damages shall be the

royalty fee determined pursuant to section 2187(c) of this title, together with such costs, interest and reasonable attorney's fees as may be fixed by the court * * * * If any such patent licensee shall fail to pay such royalty fee, the patentee may bring an action in any court of competent jurisdiction for such royalty fee, together with such costs, interest and reasonable attorney's fees as may be fixed by the court.

Department of Housing and Urban Development Act
42 U.S.C. §3537a(c)(5)

The monetary judgment may, in the court's discretion, include the attorneys' fees and other expenses incurred by the United States in connection with the action.

42 U.S.C. §3544(c)(3)

Appropriate relief that may be ordered by such district courts shall include reasonable attorney's fees and other litigation costs.

42 U.S.C. §3545(i)

The monetary judgment may, in the court's discretion, include the attorneys' fees and other expenses incurred by the United States in connection with the action.

Outer Continental Shelf Lands Act
43 U.S.C. §1349(b)(2)

Any resident of the United States who is injured in any manner through the failure of any operator to comply with any rule, regulation, order, or permit issued pursuant to this Act may bring an action for damages (including reasonable attorney fee and expert witness fees) * * * *

Alaska Native Claims Settlement Act
43 U.S.C. §1619(b)

A claim for attorney and consultant fees and out-of-pocket expenses may be submitted to the Chief Commissioner of the United States Court of Claims for services rendered before December 18, 1971 to any Native tribe * * * *

Shipping Code (as codified by P.L. 109-304 (2006))
46 U.S.C. §51509(e)(2)

If the Secretary of Defense is unable or unwilling to order an individual to serve on active duty under paragraph (1), or if the Secretary of Transportation determines that reimbursement of the cost of education provided would better serve the interests of the United States, the Secretary of Transportation may recover from the individual the amount of student incentive payments, plus interest and attorney fees.

46 U.S.C. §51509(f)(2)

If the Secretary of Defense is unable or unwilling to order an individual to serve on active duty under paragraph (1), or if the Secretary of Transportation determines that reimbursement of the cost of education provided would better serve the interests of the United States, the Secretary of Transportation may recover from the individual the amount of student incentive payments, plus interest and attorney fees.

Guam Organic Act
48 U.S.C. §1424c(f)

Attorney's fees paid by claimants to counsel representing them may not exceed 5 per centum of any additional award. Any agreement to the contrary shall be unlawful and void. Whoever, in the United States or elsewhere, demands or receives any remuneration in excess of the maximum permitted by this section shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $5,000 or imprisoned not more than twelve months, or both. A reasonable attorney's fee may be awarded in appropriate cases.

ICC Termination Act of 1995
49 U.S.C. §14708(e)

In any court action to resolve a dispute between a shipper of household goods and a carrier providing transportation, or service subject to jurisdiction under subchapter I or III of chapter 135 concerning the

transportation of household goods by such carrier, such carrier may be awarded reasonable attorney's fees by the court only if the shipper brought such action in bad faith * * * *

Transportation
49 U.S.C. §30116(c) (motor vehicle safety)

The action may be brought * * * to recover damages, court costs, and a reasonable attorney's fee.

49 U.S.C. §31105(b)(3)(B)
(commercial motor vehicle safety)

[T]he Secretary may assess against the person against whom the order is issued the costs (including attorney's fees) reasonably incurred by the complainant in bringing the complaint.

49 U.S.C. §80114(a) (lost, stolen,
and destroyed negotiable bills)

The court may order payment of reasonable costs and attorney's fees to the carrier.

REPLY BRIEF

No. 09-448

In The
Supreme Court of the United States

BRIDGET HARDT,

Petitioner,

v.

RELIANCE STANDARD
LIFE INSURANCE COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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In the Supreme Court of the United States

No. 09-118

BRIDGET HARDT, PETITIONER,

v.

RELIANCE STANDARD LIFE INSURANCE COMPANY, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Respondent Reliance Standard Life Insurance Company abandons the central argument it urged below and in its opposition in this Court (*see* BIO 2-9), and that the Fourth Circuit adopted in vacating the district court's fee award—namely, that ERISA Section 502(g)(1) is a "prevailing party" statute governed by *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001). Instead, Reliance now advances as a new theory that Section 502(g)(1) is not a traditional "prevailing party" statute as in *Buckhannon*, but rather is governed by *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), which expressly rejected a strict "prevailing party" requirement when a statute lacks that term of art. At the same time, Reliance seeks to apply the strictest interpretation (however untenable) of *Buckhannon*'s "prevailing party" standard.

Respondent's desertion of the Fourth Circuit's rule that ERISA Section 502(g)(1) is a *Buckhannon* "prevailing party" statute readily allows the Court to resolve this case on the narrow ground raised by the first question presented. Reliance below, and in opposing certiorari here, did not object to the well-established five-factor test, which has proved during the past thirty years to be a workable standard to appropriately guide—and limit—district courts' Congressionally-granted discretion to award fees to either party. The five-factor test is consistent with *Ruckelshaus*. It remains faithful to ERISA's trust law origins and express goal to ensure participants' and beneficiaries' rights are not underenforced, while allowing ERISA-governed plans to develop. The Court accordingly should give effect to Congress' considered decision not to include the "prevailing party" term of art by reversing the Fourth Circuit.

If the Court reaches the second question, it should reject Reliance's attempt to meld *Ruckelshaus* into *Buckhannon* and other "prevailing party" cases. Reliance makes the remarkable argument—notwithstanding *Ruckelshaus*' express rejection of a narrow "prevailing party" requirement—that *Ruckelshaus*' modest standard of "some success on the merits" means that all similarly-worded fee-shifting statutes that do not use the "prevailing party" term of art must be interpreted just like "prevailing party" statutes. Reliance further argues that those statutes require judicial action in the form of a judgment or consent decree before fees may be awarded and that this judicially-ordered relief must be substantive, not purely procedural.

Reliance's argument rests on a fundamental misreading of *Ruckelshaus*, which interpreted statutes containing "whenever appropriate" fee-shifting language. *Ruckelshaus* acknowledged that these "whenever appropriate" fee statutes—and Reliance concedes "there is no principled difference" between "whenever appropriate" fee statutes and Section 502(g)(1) (Resp. Br. at 19)—are more expansive than statutes containing the "prevailing party" term of art. *See* 163 U.S. at 686 n.8, 689. *Ruckelshaus* recognized that "suits that force[] defendants to abandon illegal conduct, although without court order," fall within this more expansive category. *Id.* at 686 n.8. The Court viewed Congress' decision not to use the "prevailing party" term of art as "reject[ing] the restrictive notions of 'prevailing party'" that had applied in cases where courts refused to award fees—*e.g.*, where the claimant secured the very relief sought from a private party in a non-judicial proceeding after the lawsuit was filed or where the claimant received the requested relief after filing but without a formal court adjudication. *See id.* at 689-90 (citing *Pearson v. Western Electric Co.*, 542 F.2d 1150 (10th Cir. 1976) and *Goodall v. Mason*, 419 F. Supp. 980 (E.D. Va. 1976) as examples of cases rejected by the more expansive "whenever appropriate" fee-shifting term).

By further proposing a mandatory "court-ordered judgment on the merits" standard, coupled with a formalistic (and unworkable) "substance vs. purely procedural relief" overlay, Reliance ultimately turns *Ruckelshaus* on its head as more restrictive than *Buckhannon*'s "prevailing party" test.

This is not to say that Hardt does not meet *Ruckelshaus* and *Buckhannon* as written: she does. Hardt obtained a court order finding that she "did not get the kind of review to which she was entitled under applicable law" in that Reliance's benefits review "failed to comply with [] ERISA" and was "not based on substantial evidence." Pet. App. 47a, 48a. That order, which the district court specifically stated was "on [the] merits" (Pet. App. 11a n.3), effectively vacated Reliance's decision to terminate Hardt's LTD benefits and directed Reliance to reconsider her continued eligibility for benefits in accordance with law. This judicial relief constitutes "success on the merits." *See Shalala v. Schaefer*, 509 U.S. 292, 302 (1993).

Reliance has not provided a valid reason why the Court should superimpose a prevailing party or judgment requirement upon Section 502(g)(1) when those terms, by Congressional design, were not included there. Nor has Reliance offered any justification for this Court to discard a thirty-year-old, effectively-functioning test that is true to ERISA's equity roots, its express statutory text and purpose, and this Court's precedent. At bottom, Reliance's proposed rules not only upset settled law, but are unfaithful to ERISA's text and explicit goal to protect claimants and beneficiaries from underenforcement of their statutory rights.

ARGUMENT

I. The Court Should Decide the Case on the Ground That ERISA Section 502(g)(1) Does Not Limit Fees To a "Prevailing Party."

Respondent no longer contends that Section 502(g)(1) is a *Buckhannon* "prevailing party" statute. Yet that was the basis for the Fourth Circuit's judgment. That judgment cannot stand, as Reliance effectively concedes by abandoning its premise. *See* Resp. Br. 33 (arguing "modified prevailing party standard" from *Ruckelshaus* governs). Indeed, Reliance does not cite *Buckhannon* at all in Part I of its argument on the first question presented. The Court should decide—consistent with all the parties' submissions—that Section 502(g)(1) is not a "prevailing party" statute governed by *Buckhannon*.

A. The First Question Presented Is Properly Before the Court and Respondent Has Waived Its Argument Otherwise.

Reliance half-heartedly asserts in a footnote (at 9 n.4), that the Court should not address the first question presented because the question supposedly was not pressed or passed on below. Reliance waived this assertion by not raising it in its brief in opposition. *See* Rule 15.2; *see also Aetna Health Inc. v. Davila*, 542 U.S. 200, 212 n.2 (2004) (deeming respondent's argument waived where not raised in brief in opposition).

Reliance's position also is factually and legally meritless. Relying on its longstanding precedent, the Fourth Circuit held: "It is well settled that 'only a prevailing party is entitled to consideration for

attorney's fees in an ERISA action.'" Pet. App. 7a-8a (quoting *Martin v. Blue Cross & Blue Shield of Va., Inc.*, 115 F.3d 1201, 1210 (4th Cir. 1997)). The first question presented—whether ERISA restricts an award of fees only to a prevailing party—was passed on by the court below; indeed, it was central to the judgment. The first question thus is properly before the Court. *United States v. Williams*, 504 U.S. 36, 42 (1992) (holding traditional rule "permit[s] review of an issue not pressed [below] so long as it has been passed upon").[1]

B. Section 502(g)(1)'s Text Demonstrates It Is Not a "Prevailing Party" Statute and Does Not Require a Judgment To Trigger Fees.

As explained in Hardt's opening brief (at 20-27), Congress specifically determined on two separate occasions *not* to require either prevailing party status or a judgment in order to trigger eligibility for a fee award under Section 502(g)(1). *See also* United States Br. 11-14. Reliance nonetheless asserts (at 33, 35, 47-47) that Section 502(g)(1) requires a court-ordered judgment granting a participant's claims for benefits before fees may be awarded. In addition to misreading *Ruckelshaus* in this regard, Reliance's position (at 22-27) contradicts the plain language of the statute, as well as its context and history.

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[1] The Court also should reject Reliance's contention (at 9 n.4) that the second question does not merit review. This Court already has granted review on that important issue dividing the lower courts. If, however, the Court holds that Section 502(g)(1) is not a "prevailing party" statute, then it need not reach the second question, as Hardt is entitled to fees under the five-factor test.

For example, Reliance glosses over the fact that ERISA's precursor, the Welfare and Pension Plans Disclosure Act, *required a judgment* before fees could be awarded. 29 U.S.C. § 308(c) (providing court "may in its discretion, in addition to any judgment awarded to the plaintiff," award fees "paid by the defendant") (repealed 1974). Reliance notes that Congress, in enacting ERISA to replace the WPPDA, expanded fee awards to be granted "to either party." Without any support, Reliance speculates from that (at 23) that Congress may not have wanted to mandate fees to prevailing parties, but fails to acknowledge that fee awards under the WPPDA already were discretionary, not automatic. *See, e.g., Kolentus v. Aveo Corp.*, 798 F.2d 949, 960 (7th Cir. 1986).[2]

Reliance further fails to address that Congress not only extended to whom fees could be awarded (and

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[2] Reliance mistakenly relies (at 24-25) on the Securities Exchange Act of 1934, including its legislative history, and the Trust Indenture Act as support for its view that ERISA's fee provision was meant to prevent strike suits. Those provisions from a Congress forty years prior to ERISA's enactment have no bearing here, as they sought to prevent strike suits by authorizing the posting of a bond to cover anticipated costs (including attorney's fees). See 15 U.S.C. §§ 78i(e), 78r(a); 15 U.S.C. § 77www(a).

By contrast, Section 502(g)(1) does not permit a bond posting to curb ERISA claims. Congress instead declared an object of ERISA "to protect" participants and their beneficiaries by "providing for appropriate remedies, sanctions, and *ready access to the Federal courts.*" 29 U.S.C. § 1001(b) (emphasis added). This text is clear enough, but legislative history shows Congress rejected requests to add a strike suit provision to ERISA. See Pet. Br. at 21-22 n.3.

from whom fees could be taxed), but also expanded the *nature of the act* necessary to trigger a fee award. In ERISA, Congress *removed* the requirement of a judgment to trigger fees that existed in the relatively ineffectual WPPDA. *Compare* 29 U.S.C. § 308(c) (repealed 1974), *with* 29 U.S.C. § 1132(g)(1).

And Reliance simply is wrong when it suggests (at 31 n.11) that the later insertion of "prevailing party" and "judgment" language in separate sections of ERISA is irrelevant to interpreting Section 502(g)(1). Contrary to Reliance's suggestion otherwise (*id.*), Congress simultaneously inserted *in the same legislation* the word "judgment" within the newly-created Section 502(g)(2) and included the "prevailing party" term of art in 29 U.S.C. § 1451(e), but amended and reenacted Section 502(g)(1) without such language. *See* Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, § 104(2), 94 Stat. 1208, 1263 (adding 29 U.S.C. § 1451(e)); *id.*, at §306(b), 94 Stat. 1295 (amending original Section 502(g) and enacting new Section 502(g)(1) and its statutory sibling as Section 502(g)(2)).

This course of events demonstrates Congress' intent not to have Section 502(g)(1) governed by these more restrictive fee standards. *See Gross v. FBL Fin. Servs.*, 129 S. Ct. 2343, 2349 (2009) ("negative implications raised by disparate provisions are strongest" where the provisions were "considered simultaneously when the language raising the implication was inserted"); and *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) ("when Congress includes particular language in one section of a statute but omits it in another section of the same

Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotations omitted).

In sum, Reliance offers no valid reason to override Congress' clear intent that Section 502(g)(1) not require a judgment or narrow "prevailing party" standard before fees may issue.

C. The Five-Factor Test Is Consistent With *Ruckelshaus* and Has Proved To Be a Workable Test Faithful To ERISA's Explicit Purpose, While Permitting the Growth of ERISA Plans.

Reliance complains (at 19, 27, 51) that the five-factor test is inconsistent with *Ruckelshaus* and ERISA's goal to encourage formation of employee benefit plans. This argument fails.

First, Reliance has waived this argument, twice. Reliance contends (at 60 n.27) that Hardt should have complained below regarding the five-factor test. Yet, Hardt *prevailed* before the district court on her motion for fees. She did not appeal that award. Reliance did. Reliance chose not to challenge the use of or findings under that standard, instead limiting itself to the *Buckhannon* "prevailing party" issue. *See* Cert. Pet. at 11. Reliance again failed to raise the validity of the five-factor test as an issue in its brief in opposition. *See* Rule 15.2.[3]

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[3] Reliance errs in claiming (at 5) it could not obtain review of the district court's order, which essentially vacated Reliance's decision to terminate Hardt's (*cont.*)

Regardless, the five-factor test is consistent with *Ruckelshaus*. Reliance shadowboxes when it asserts that the five-factor test would allow a completely unsuccessful litigant to be awarded fees. That is not Hardt's position, nor is it the way the test operates in the real-world. Indeed, in its merits brief Reliance fails to cite a single case where the five-factor test has led to an award of fees to a party that did not achieve some success or otherwise confer a benefit on an ERISA plan or its participants and beneficiaries. That absence speaks volumes regarding whether this longstanding test has been consistent with *Ruckelshaus* over the past thirty years.

Hardt's opening brief (at 36-37) stated that the five-factor test generally will limit fees to litigants who have achieved some success on their claims. This point recognized that under trust law, to which Congress expected courts to turn for guidance in ERISA cases, the determination of "success" may look beyond the parties and specific claims to include considerations related to the trust. The trust law

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LTD benefits and required Reliance, under explicit threat of judgment, to re-determine her entitlement to benefits within thirty days. Yet the Fourth Circuit has not taken a position within the circuit split regarding whether remedial ERISA "remand" orders are appealable. *See* United States Br. 28 n.8. Reliance also arguably could have, but did not, seek immediate appeal under 28 U.S.C. § 1292(b). Finally, if Reliance disagreed with the court's ruling and believed Hardt was not disabled at the time of the decision under review, Resp. Br. 44, Reliance could have maintained its position and then appealed the resulting district court judgment.

cases cited by Hardt (at 32-35) and the United States (at 15-19) establish that courts were not constrained by narrow "prevailing party" requirements. Reliance does not and cannot contest that these cases explicitly state that courts may award fees "regardless of outcome," *Hurley v. Noone*, 196 N.E.2d 905, 910 (Mass. 1964), or even to "an unsuccessful litigant," *In re Bitton's Trust*, 244 N.Y.S.2d 926, 931-33 (Sup. Ct. 1963). *See* Resp. Br. 65 n.30.

These trust cases recognize the availability of awards to parties who did not receive a favorable judgment where the suit conferred some benefit to the trust or person related to it. *See Hurley*, 196 N.E.2d at 910; *In re Bitton's Trust*, 244 N.Y.S.2d at 931-33; *In re Catell's Estate*, 38 A.2d 466 (Del. Ch. 1944) (awarding fees on ground that the suit arose from trustee's failure to abide by trust terms, even though the party was unsuccessful in his claim to remove the trustee); *Daniel v. White*, 252 S.E.2d 912, 915 (S.C. 1979) (awarding fees to losing plaintiff because he performed a service to the trust and benefited others); *Old Colony Trust Co. v. Rodd*, 254 N.E.2d 886, 890 (Mass. 1970 (mistakenly labeled as *Marshall v. Babson Inst.* (United States Br. 17), but correctly cited and described as permitting consideration of fee award despite affirming lower court decree against the plaintiff); *see also, e.g., Grein v. Cavano*, 379 P.2d 209, 211 (Wash. 1963) ("The party whose participation in the litigation brings benefit to the common fund is entitled to an award of reasonable attorneys' fees regardless of his success in litigation.").

In any event, this case does not present the outer limits of whether a court would necessarily abuse its discretion if it awarded fees to a claimant who did not obtain some success for herself or the plan or its participants and beneficiaries. The five-factor test takes these considerations into account, and no case in three decades that the parties could find has held that the test would extend to parties who achieved nothing.

Moreover, endorsing the five-factor test here would not, as Reliance claims (at 31-33), affect other statutes listed in Reliance's appendix. Reliance fails to account for application of trust law principles in interpreting ERISA, *see* Pet. Br. 32-37; United States Br. 15-21, which distinguishes Section 502(g)(1) from similarly-worded statutes serving different purposes in unrelated contexts. Reliance also refuses to recognize that, unlike other statutes, ERISA's express purpose is "to protect" participants and beneficiaries by providing "appropriate remedies, sanctions and ready access to Federal courts." 29 U.S.C. § 1001(b).

In reality, the five-factor test has long coexisted with the development and growth of ERISA-covered plans. *See* Resp. Br. 60 (acknowledging "every circuit" "applies some version of the five-factor test" since its adoption in 1978). Reliance provides no empirical support for its supposition that eliminating the Fourth Circuit's extra-statutory "prevailing party" requirement would somehow lead to an explosion of fee awards, nor that it would affect adoption of ERISA plans. *Cf. Metro. Life Ins. Co. v. Glenn*, 128 S. Ct. 2343, 2349 (2008) ("We have no reason, empirical or

otherwise, to believe that our decision will seriously discourage the creation of benefit plans.").

* * *

The Fourth Circuit erred in reading the "prevailing party" test from *Buckhannon* into Section 502(g)(1). Hardt is entitled to fees under the five-factor test as determined by the district court in its appropriate discretion, and Reliance did not challenge that issue on appeal. Therefore, in vacating the Fourth Circuit's erroneous judgment, the Court should remand with instructions to enter the original attorney's fees order and to conduct further proceedings relating to Hardt's entitlement to fees for the appeals.

II. If the Court Reaches the Second Question Presented, Hardt Is Eligible for a Fee Award Based on the Judicial Order Finding an ERISA Violation and Requiring Compliance With the Statute, After Which the Administrator Granted the Benefits Sought.

For the above reasons, the Court need not reach the second question. But if it does, Hardt is entitled to fees because she meets both *Buckhannon*'s "prevailing party" test, and *Ruckelshaus*' more expansive standard. Pet. Br. 38-50; United States Br. 21-30.

Reliance now contends (at 13-33) that Section 502(g)(1) should be governed by *Ruckelshaus* (rather than *Buckhannon*). Reliance acknowledges that *Ruckelshaus* represents a more expansive standard for fees than a "prevailing party" statute. *Id.* at 26. But it then argues (at 34-50) that to satisfy *Ruckelshaus* a claimant must have procured success on the merits via a judicially-ordered judgment that

constitutes "substantive" relief—a new standard which is even more restrictive than *Buckhannon*'s "prevailing party" test.

The Court should not adopt Reliance's radical test. Reliance's position is based on a fundamental misreading of *Ruckelshaus*, conflicts with this Court's precedents, and undermines ERISA's carefully-crafted remedial scheme.

A. Reliance's Proposed Test Conflicts With the Holding of *Ruckelshaus* Because It Is More Restrictive Than *Buckhannon*.

To appreciate the extreme nature of Reliance's position, it helps to review what *Buckhannon* requires.

A party must satisfy two preconditions to become eligible for fees under a traditional "prevailing party" standard. First, the party "must succeed on any significant issue in litigation which achieves some of the benefit it sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)) (internal quotation marks omitted). The "touchstone" of that success "is the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Sole v. Wyner*, 551 U.S. 74, 82 (2007) (quoting *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782, 792-793 (1989)). Second, that material alteration must be judicially sanctioned. *Buckhannon*, 532 U.S. at 605.

Judgments on the merits or consent decrees, although sufficient, are not necessary to trigger fee awards under this "prevailing party" standard. *Buckhannon*, 532 U.S. at 605 (treating judgments and consent decrees as "examples" of judicial orders that constitute "a material alteration of the legal relationship"). In fact, interim fee awards are allowed "when a party has prevailed on the merits of at least some of his claims." *Id.* at 603 (quoting *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980) (per curiam)). And this is so "although final remedial orders [have] not been entered." *Hanrahan*, 446 U.S. at 757 (citing *Bradley v. Richmond School Board*, 416 U.S. 696 (1974)); *see Bradley*, 416 U.S. at 723 n.28 ("the entry of any order that determines substantial rights of the parties may be an appropriate occasion upon which to consider the propriety of [a fee] award").[4]

B. Respondent Misreads *Ruckelshaus*.

Reliance misreads *Ruckelshaus* in two fundamental ways. First, Reliance improperly interprets *Ruckelshaus* as requiring judicially-ordered relief on the merits (though Hardt achieved that here, as discussed below). Nothing in

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[4] In *Bradley*, the statute under which fees were awarded, 20 U.S.C. § 1617 (since repealed), permitted awards only "[u]pon entry of a final order by a court of the United States." In allowing an interim award, the Court noted that "many final orders may issue in the course of litigation." *Id.* at 723. Thus, where a statute does not expressly make entry of final judgment a prerequisite, fee awards may be appropriate prior to entry of a formal, final judgment under Fed. R. Civ. P. 58 or dismissal under Fed. R. Civ. P. 11.

Ruckelshaus dictates that the requisite success under statutes that do not use the "prevailing party" term of art must derive from a court-ordered judgment on the merits or otherwise be judicially-sanctioned. (*Buckhannon* requires a "judicial imprimatur," but that is for "prevailing party" statutes.) *Ruckelshaus* recognized that the difference between prevailing party and "whenever appropriate" statutes includes not only the degree of success, but also the impetus for the success.

The Court specifically acknowledged that Congress in "whenever appropriate" fee statutes intended to authorize fees for "legitimate" lawsuits that "forced defendants to abandon illegal conduct, although without a formal court order." *Ruckelshaus*, 463 U.S. at 686 n.8 (1983). The Court in *Ruckelshaus* also pointed to specific examples of cases Congress rejected by adopting the more expansive "whenever appropriate" fee-shifting term, including where the claimant secured the very relief sought in the lawsuit from a private party in a non-judicial proceeding and where the claimant received the requested relief after the lawsuit was filed but without a formal court adjudication. *See id.* at 689-90 (citing *Pearson v. Western Electric Co.*, 542 F.2d 1150 (10th Cir. 1976) and *Goodall v. Mason*, 419 F. Supp. 980 (E.D. Va. 1976)).

By citing these types of cases as ones in which fees could issue under the "whenever appropriate" statutes, *Ruckelshaus* rejected Reliance's argument that a party must obtain "substantive judicial relief" that can only be measured by the content of a judgment. Resp. Br. at 35, 45-47. Every court of

appeals to have considered the question agrees that *Ruckelshaus* differs from *Buckhannon* in this key respect and that *Ruckelshaus* continues to govern statutes that omit "prevailing party" language. *See* Pet. Br. 39 (citing cases). And Reliance's argument ignores that Congress specifically omitted from Section 502(g)(1) the requirement of a judgment. *See* Section I.B. *supra*.[5]

Second, Reliance inappropriately divides the world into "prevailing parties" and non-prevailing parties, and equates the totally losing parties in *Ruckelshaus*—those who were completely unsuccessful on every aspect of their claims—with all other so-called non-prevailing parties. Yet the thrust of *Ruckelshaus* was that Congress recognized and allowed for fees in the vast middle ground between the two extremes of a litigant who obtains "prevailing party" status and one who is otherwise "completely unsuccessful."

Reliance then misapplies *Ruckelshaus* by placing Hardt in the same category as the plaintiffs in *Ruckelshaus* who were "wholly unsuccessful" in their

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[5] Reliance therefore errs in relying on Fed. R. Civ. P. 54(d)(2), which by its terms does not apply when a statute "provide[s] otherwise." Moreover, where multiple claims are at issue, Rule 54(b) treats orders and decisions that adjudicate some but not all of the claims on the merits as something other than a judgment, unless the district court expressly determines otherwise. Under this Court's "prevailing party" jurisprudence an order that resolves some claims in favor of the plaintiff is sufficient to support a fee award for work on those claims, even if the timing must await a final judgment.

claims and requested fees against a defendant "who was completely successful on all issues." Hardt was a "prevailing party" in this case and by no means brought a "totally unsuccessful action." And Reliance in no way can be equated to a party who was "completely successful" on all issues.

As a result of Hardt's suit, the court effectively vacated Reliance's prior decision to terminate Hardt's LTD benefits, finding it violated ERISA and was unsupported by substantial evidence. The district court explicitly stated it was "assess[ing] the case on its merits." Pet. App. 41a n.3. As relief, the court required Reliance to consider specific evidence and act within 30 days, or judgment would issue in Hardt's favor. Hardt obtained the benefits during the court-supervised reconsideration. Once Reliance complied with the remedial order, the court ruled on the fee petition, entered judgment in Hardt's favor and dismissed the case.[6]

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[6] Reliance states (at 44 n.20) that the record appropriately is limited to evidence before the administrator at the time of the decision to terminate Hardt's benefits. Yet Reliance then asks the Court to open the record via a lodging to include a medical record generated more than two years after its decision to terminate Hardt's LTD benefits. *Id.* at 7 n.3.

The Court should decline the lodging. There is nothing in the record to support Reliance's assertion on appeal that it relied on this new material on "remand." Indeed, in contemporaneous filings with the Court and correspondence with Hardt, Reliance did not reference these records as a basis for granting Hardt the benefits. JA115a; 117a-123a.

The district court did not specify the type of dismissal after its prior "on [the] merits" "remand" order. Pet. App. 41a. Respondent speculates it was a dismissal on mootness grounds. Resp. Br. 48. But that does not square with its request to the district court that the "case [] be dismissed *with prejudice*," JA115a (emphasis added), which is shorthand for "on the merits." *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001).

Regardless, the disposition here is nearly identical to that in a "sentence six" Social Security case, where fees are available after a Secretary grants benefits on remand. *See Shalala v. Schaefer*, 509 U.S. 292, 300 and n.4. In *Sullivan v. Hudson*, which this Court treats as a "sentence six" case (*see Schaefer*, 509 U.S. at 299-300 and n.3, n.4), the district court simply dismissed the case and entered judgment in favor of plaintiff *only* on attorney's fees. *See Hudson*, 490 U.S. 877, 882.

Hardt achieved a "material alteration" of the legal relationship between the parties by judicial order and thus satisfies *Buckhannon*, which necessarily means she also fulfills *Ruckelshaus'* lesser requirement of "success on the merits."

C. Reliance's Attempt To Characterize the Relief Granted In This Case as "Purely Procedural" Is Inaccurate and Inconsistent With Precedent.

Reliance asserts that the finding of an ERISA violation here cannot constitute success on the merits to support a fee award because the judicial relief for that violation—an effective vacatur of the benefits

decision and an order to issue a new one in accordance with the court's opinion—was "purely procedural," not substantive. Resp. Br. at 38-42. That is a false and inapt distinction, especially when one compares the truncated footnote Reliance sets forth with the full footnote as written by the district court. *Compare* Resp. Br. 41-42 (truncated footnote), *with* Pet. App. 20a n.5 (providing in the remainder: "Nonetheless, speculation as to what might have happened is useless in light of what actually did happen—namely, the defendant, under threat of judgment against it, reversed its decision and chose to award the plaintiff the precise relief she was seeking. Clearly, then, the *plaintiff was afforded judicially sanctioned relief.*") (emphasis added)).

The legal right at issue here includes the right to a full and fair claims process when determining benefits. *See* 29 U.S.C. § 1133. It also involves the right to ensure Reliance has faithfully carried out its fiduciary obligations in making that benefit determination. *See Glenn*, 128 S.Ct. at 2347 ("a benefit determination [is] a fiduciary act (*i.e.*, an act in which the administrator owes a special duty of loyalty to the plan beneficiaries"); *see also Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989) (same).[7] These rights may be enforced by a court order enjoining the violation or other appropriate equitable relief redressing the violation or enforcing the right. *See* 29 U.S.C. § 1132(a)(3); *see also, Varity Corp. v. Howe*, 516 U.S. 489, 512-15 (1996).

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[7] All cases respondent relies upon (at 39-41) to make its "substantive vs. purely procedural" argument pre-date *Bruch*'s recognition in 1989 that a benefits decision is a fiduciary act, later reinforced by *Glenn*.

That these rights also are related to a claim for benefits (indeed, are intertwined with it) does not make the relief afforded for such violations any less relevant for measuring "success on the merits." Without a "full and fair" review, the administrator abuses its discretion and violates a fiduciary duty, particularly when its decision, as here, is not supported by substantial evidence. *See Glenn*, 128 S.Ct. at 2317. In this regard, ordering the claims administrator to abide by the statutory-mandated "full and fair" review process constitutes relief for these violations.

Such a result also follows from the Social Security Act cases cited in Hardt's merits brief. Pet. Br. at 41-45 (citing *Shaefer* and *Hudson*); *see also*, United States Br. 24-28. A "sentence four" remand order" is identical to the district court's order in this case, except for the entry of judgment. While required under the SSA, 42 U.S.C. § 405(g), entry of judgment is not required under Section 502(g)(1). Yet in both cases the district court has found a violation of law and vacated the underlying benefits decision. As relief, the court orders a new benefits decision in accordance with the law. Thus, it is the finding of a violation in a judicially-enforced order that triggers eligibility for fees under a "prevailing party" statute in this context. *See Schaefer*, 509 U.S. at 302. The unique element of E.A.J.A's judgment feature simply affects the *timing* of an award (within 30 days after entry of judgment), not *eligibility* for the award.

Reliance does not and cannot contend that the relief awarded in a "sentence four" Social Security case is any less "procedural" or more "substantive" than that awarded here. A court ordered "remand" for a new benefits determination due to a violation of law is enough to trigger "prevailing party" status—the order substantially affects the legal relationship between the parties. *See Schaefer*, 509 U.S. at 302. Accordingly, Reliance's attempted distinction between procedure and substance in this context is foreclosed by *Schaefer*.

This situation is entirely different from that in *Hanrahan*, on which Reliance relies for its proposed substantive/procedural distinction. The plaintiff in *Hanrahan* simply obtained reversal of a directed verdict issued by the district court; there was no finding that defendant had violated the law nor any order of relief on the merits of the claim. *See* 446 U.S. at 758-59. It is this distinction (not a procedure vs. substance distinction) that makes the difference in triggering eligibility for fees.

These events also reinforce that Reliance reached the correct result only after, pursuant to court order and under threat of judgment, it finally provided Hardt the "full and fair" review to which she was entitled by law. That result should have been achieved in the first instance had Reliance complied with ERISA. And Reliance's policy argument that administrators will "think twice" before awarding benefits or be incented to *deny* benefits on "remand" (at 31, emphasis in original) ignores the administrator's fiduciary obligations in benefits determinations and inappropriately places the focus

on an administrator's actions on "remand," rather than whether the original award was in accordance with law. Reliance's policy arguments thus counsel in favor of adopting Hardt's proposed rule (Pet. Br. at 40-41), which trigger's fees based on a "remand" order that, as here, is based on an ERISA violation. Fiduciaries should be incented to comply with the law in the first instance.[8]

In sum, an ERISA claim for benefits concerns not solely whether benefits should be awarded, but also whether the administrator acted lawfully in reviewing the evidence or applying the plan, usually including whether substantial evidence supports the determination. Courts that find the administrator acted arbitrarily and capriciously and therefore unlawfully (as here), have not simply made a procedural ruling on a question of law (as in *Hanrahan*). Instead, they have found that rights guaranteed by ERISA were violated. By remanding for a new determination, courts provide relief on the merits both in the sense of vacating the original decision and by mandating that the claimant receive the right to a full and fair review as required by statute. This result is sufficient to trigger an award of fees under "prevailing party" statutes, and therefore

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[8] Reliance errs in suggesting (at 40, 51) it is settled law that a court apply an abuse of discretion standard to review of a "remand" benefit decision by an administrator previously found to have violated a fiduciary duty on the same matter. *Cf.* Brief for United States as Amicus Curiae Supporting Respondents in *Conkright v. Frommert*, No. 08-810, at 9-10, 13-21.

should be sufficient to render a party eligible for fees under Section 502(g)(1).

D. Reliance's Rule Would Eviscerate Critical ERISA Enforcement Provisions.

ERISA relies on several enforcement mechanisms—which Reliance apparently deems "purely procedural"—to ensure participants and beneficiaries are protected. Under Reliance's test, those critical statutory rights would become meaningless.

For example, plan administrators are required to provide information and documents to participants and beneficiaries. *See* 29 U.S.C. § 1166 (requiring notice of ERISA rights and right to continue in plan); *id.* § 1021(e)(1) (requiring notice of excess pension assets to health benefits accounts); *id.* § 1021(f) (requiring annual notice for defined benefit plan funding and other information); *id.* § 1025(a) (requiring pension benefits statements with specific information); and *id.* § 1024(b)(4) (requiring copy of plan and other documents upon request). Many of these documents are necessary to determine whether ERISA has been violated, and ERISA allows private enforcement for violations. *See id.* § 1132(a)(1)(A), *id.* § 1132(c). Similarly, ERISA requires a benefit plan to allow an appeal of an adverse benefit decision. *Id.* § 1133(2).

Under Reliance's proposed rule, an administrator could refuse to provide mandated documents and information or refuse to process a benefit appeal and then, when ordered by a court to do so, argue that there is no right to a fee award because the order is

"purely procedural." This bizarre result cannot be the intent of Congress in enacting a fee provision allowing a court to award fees in its discretion to either party to protect rights of participants and beneficiaries.

III. Simply Applying Common Law Exceptions Would Render Section 502(g)(1) Superfluous.

Finally, to address Reliance's closing suggestion that the Court apply only existing common law exceptions to determine eligibility for awards under ERISA Section 502(g)(1): if Congress wanted only existing exceptions to the American Rule to apply, there would have been no need to enact the fee-shifting provision of Section 502(g)(1). Moreover, as explained in Hardt's opening brief (at 32-37), common law trust cases provide broad discretion to courts to award attorney's fees even absent a strictly prevailing party. *See also* note 5, *supra*; United States Br. at 15-21.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 09-448

In the Supreme Court of the United States

BRIDGET HARDT, PETITIONER

v.

RELIANCE STANDARD LIFE INSURANCE COMPANY

ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether Section 502(g)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(g)(1), permits courts to award reasonable attorney's fees only to a "prevailing party."

2. Whether a benefits claimant may be awarded attorney's fees pursuant to ERISA Section 502(g)(1) when a district court finds that the administrator has violated ERISA and orders the administrator to redetermine the claimant's entitlement to benefits, and the administrator then grants the benefits sought.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case concerns the standard under which a court may award attorney's fees pursuant to Section 502(g)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(g)(1). The Secretary of Labor has primary authority for administering Title I of ERISA, see 29 U.S.C. 1002(13), 1135, 1136(b), of which Section 502(g)(1) is a part.

STATEMENT

1. Congress enacted ERISA "to protect * * * the interests of participants in employee benefit plans and their beneficiaries * * * by establishing standards of conduct, responsibility, and obligations for fiduciaries of employee benefit plans, and by providing for appropri-

ate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b). Section 502 of ERISA, 29 U.S.C. 1132, sets forth a comprehensive enforcement scheme that authorizes plan participants and other interested parties to sue to enforce their rights under ERISA benefit plans and under the statute. In particular, Section 502(a)(1)(B) permits a participant or beneficiary to bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. 1132(a)(1)(B).

ERISA expressly provides for an award of attorney's fees in actions under Section 502. As relevant here, Section 502(g)(1) states:

> In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

29 U.S.C. 1132(g)(1).[1]

ERISA Section 503 imposes requirements on a plan's consideration of benefits claims, including a reasonable opportunity for a "full and fair review" by the plan fiduciary of any denial. 29 U.S.C. 1133(2). Pursuant to Section 503, the Secretary of Labor has promulgated a regulation requiring, *inter alia*, that the claimant be allowed to appeal an initial denial of a claim to an appropriate named fiduciary, who (on a disability claim) must

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[1] Paragraph 2 governs actions by a plan fiduciary to recover delinquent contributions and provides for an award of attorney's fees against the defendant only when "a judgment in favor of the plan is awarded." 29 U.S.C. 1132(g)(2)(D).

take into account all the information submitted by the claimant; and that the claimant be given, upon request and free of cost, reasonable access to documents, records, and other information relied upon as part of a "full and fair review" process. 29 C.F.R. 2560.503-1(b) and (h).

2. a. Petitioner worked as an administrative assistant at Dan River, Inc., a textile manufacturer. Pet. App. 31a-32a. Dan River sponsors the Group Long-Term Disability Insurance Program Plan (the Plan), an ERISA-governed welfare plan, in which petitioner is a participant. *Id.* at 32a. The Plan provides 24 months of benefits to a claimant who is unable to perform her existing job due to a medical disability. After 24 months, the Plan provides benefits only so long as a claimant is unable to perform any occupation. *Id.* at 36a. Respondent both decides whether a claimant is entitled to benefits and pays any such benefits. *Id.* at 32a.

In 2000, while employed at Dan River, petitioner began experiencing pain in her neck and shoulders. After being diagnosed with carpal tunnel syndrome, petitioner underwent surgery on both wrists. Petitioner continued to suffer pain, however, and she stopped working at Dan River in January 2003. In August 2003, petitioner applied for disability benefits under the Plan. Respondent provisionally approved petitioner's claim for benefits, pending the results of a functional capacity evaluation. The evaluation was conducted in October 2003. Pet. App. 32a.

The evaluator found that petitioner had several major physical limitations, but nonetheless concluded that she could perform sedentary work. Pet. App. 32a-33a. In December 2003, based on the results of that assessment, respondent denied benefits to petitioner. *Id.* at

33a. On petitioner's appeal, respondent partially reversed its decision and agreed to provide 24 months of benefits based on petitioner's inability to do her former job. *Ibid.*

Meanwhile, petitioner was diagnosed with hereditary small-fiber neuropathy, and her pain worsened. Pet. App. 33a. Petitioner also developed pain and swelling in her calves and feet that made walking difficult and that did not respond to increased dosages of prescribed pain medication. *Id.* at 34a-35a.

b. In addition to seeking benefits under the Plan, petitioner applied for Social Security disability benefits. In support of her claim, petitioner submitted reports from two treating physicians who concluded that she was unable to perform even sedentary work. Pet. App. 35a. The Social Security Administration awarded benefits, concluding that petitioner was physically unable to return to her old job or adjust to other work. *Id.* at 35a-36a.

c. Shortly after petitioner received the award of Social Security benefits, respondent notified petitioner that her disability benefits would terminate at the end of the 24-month period because, according to the 2003 functional capacity evaluation, she could perform available sedentary work. Pet. App. 4a-5a, 36a. Petitioner appealed again and submitted all her medical records, including the materials submitted to the Social Security Administration. *Id.* at 5a. In March 2006, after requiring petitioner to submit to two additional functional capacity evaluations and retaining a physician to review her medical records, respondent notified petitioner that it had not changed its decision to terminate her benefits. *Id.* at 4a-6a, 36a-38a.

3. a. Having exhausted her remedies under the Plan, petitioner filed this action in federal district court pursuant to ERISA. The complaint alleged, *inter alia*, that respondent violated ERISA by failing to pay benefits under the terms of the Plan. J.A. 90a-110a. Petitioner sought payment of past benefits due, a declaration of her right to future benefits, and "other relief as the Court may deem necessary and proper to secure [her] rights." J.A. 109a-110a; see Pet. App. 38a.

Both petitioner and respondent filed motions for summary judgment. The court denied respondent's motion. Pet. App. 41a-47a. It found that respondent had relied on an "incomplete and inadequate" peer review report, a vocational report based on outdated information, and functional capacity evaluations that did not assess the impact of petitioner's neuropathy, and that respondent had also failed to consider other relevant medical records submitted by petitioner. *Ibid.* The court accordingly concluded that respondent's "decision to deny [petitioner] long-term disability benefits was not based on substantial evidence." *Id.* at 47a. At the same time, the court also denied petitioner's motion for summary judgment. Although it found "compelling evidence that [petitioner] is totally disabled due to her neuropathy" and that she "did not get the kind of review to which she was entitled under applicable law," the court concluded that it would be unwise to rule on whether petitioner was disabled "without first giving [respondent] the chance to address the deficiencies in its approach." *Id.* at 48a.

The court therefore "remand[ed]" the matter to respondent "to act on [petitioner's] application by adequately considering all the evidence discussed," stating that if respondent did not do so within 30 days, "judg-

ment will be issued in favor of [petitioner]." Pet. App. 49a. Upon reconsideration, respondent granted petitioner the requested benefits. *Id.* at 13a.

b. After respondent granted her benefits, petitioner filed a motion for attorney's fees and costs pursuant to ERISA Section 502(g)(1), which the district court granted. Pet. App. 12a-30a. The court noted that, "[a]lthough not statutorily-mandated," Fourth Circuit precedent imposed a "prevailing party" prerequisite to the award of fees in ERISA cases. *Id.* at 15a (citing *Martin* v. *Blue Cross & Blue Shield of Va., Inc.*, 115 F.3d 1201, 1210 (4th Cir.), cert. denied, 522 U.S. 1029 (1997)). The court held that petitioner satisfied that standard because the order remanding the matter to respondent, which then granted benefits, constituted a "judicially sanctioned change in the legal relationship of the parties." *Id.* at 18a-22a (quoting *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001)).

Having found the "prevailing party" requirement satisfied, the court next addressed the propriety of a fee award under a flexible five-factor test, considering: (1) the degree of the opposing party's culpability or bad faith; (2) the ability of the opposing party to satisfy an award of attorney's fees; (3) whether a fee award would have a desired deterrent effect; (4) whether the party requesting attorney's fees sought to benefit all participants and beneficiaries of a plan or to advance and resolve a significant legal issue under ERISA; and (5) the relative merits of the parties' positions. Pet. App. 16a-17a. The court concluded that all the factors other than the fourth favored an award of fees to petitioner. *Id.* at 22a-25a. After adjusting the number of billed hours, the court awarded petitioner $39,149 in attorney's fees and

costs—approximately two-thirds of the amount she had requested. *Id.* at 29a-30a.

c. The court of appeals reversed. Pet. App. 1a-11a. The court of appeals relied on circuit precedent holding that only a "prevailing party" is entitled to fees in an ERISA action. *Id.* at 7a-8a (citing *Martin*, *supra*). Citing this Court's decision in *Buckhannon*, 532 U.S. at 604, the court stated that a party must receive relief in the form of either an "enforceable judgment[] on the merits" or a "court-ordered consent decree[]" to be considered "prevailing." Pet. App. 8a. Because the district court did not indicate in its remand order that petitioner was "about to prevail" (*Goldstein* v. *Moatz*, 445 F.3d 747, 751 (4th Cir. 2006)) or "require [respondent] to award benefits to [petitioner]," the court held that petitioner did not obtain an "'enforceable judgment[] on the merits,' as *Buckhannon* requires." Pet. App. 10a (quoting *Buckhannon*, 532 U.S. at 604)). The court of appeals also distinguished two cases in which district courts had awarded attorney's fees after a benefits claim was sent back to a plan administrator, noting that the plaintiffs in those cases "included a second count alleging procedural error under ERISA and requesting remand as the appropriate legal relief." *Id.* at 10a-11a. The court concluded:

> Because (1) [petitioner]'s only request for relief was the award of benefits, which the district court did not award, and (2) the district court's remand order did not satisfy the requirements of *Buckhannon* or *Goldstein*, [petitioner] does not qualify as a prevailing party and is thus not eligible for an award of attorney's fees.

Id. at 11a.

SUMMARY OF ARGUMENT

I. ERISA Section 502(g)(1) does not impose a strict "prevailing party" requirement.

A. In contrast to the vast majority of fee-shifting provisions in other statutes as well as within ERISA itself (including the subsequently added Section 502(g)(2)), the text of Section 502(g)(1) omits the term "prevailing party" or its equivalent. The absence of a strict "prevailing party" requirement is consistent with ERISA's purpose of protecting plan beneficiaries' access to courts and with the legislative history indicating that Congress deliberately departed from "prevailing party" requirements present in the preexisting statutory regime and in industry proposals.

B. Under trust-law principles, attorney's fees may be awarded at the discretion of the court without the constraints of a strict "prevailing party" requirement. Those principles are reflected in the flexible, five-factor test widely employed by courts in determining the propriety of a fee award under Section 502(g)(1). That test is consistent with this Court's decision in *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680 (1983), in which the Court interpreted a fee-shifting provision of the Clean Air Act that also lacked "prevailing party" language. Although the Court held that a completely losing party could not recover under that provision, it explained that Congress's omission indicated rejection of a strict "prevailing party" standard and instead required only "some success." *Id.* at 686-690.

II. An ERISA claimant who obtains a court order finding a violation of law and requiring the claims administrator to redetermine benefits eligibility, and who is thereafter granted benefits, is eligible for attorney's fees under Section 502(g)(1).

A. Petitioner here satisfies even a strict "prevailing party" requirement of the kind construed by this Court in *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001). *Buckhannon* held that the plaintiff was not a prevailing party by virtue of having brought a nonfrivolous but potentially meritless suit that acted as a "catalyst" for voluntary compliance by the defendant. *Id.* at 606. The Court's analysis suggested, however, that when the court determines that the defendant acted unlawfully and retains jurisdiction to ensure compliance, the plaintiff has prevailed in the relevant sense. *Id.* at 607-608 n.9. That is essentially what happened in this case: the district court found that respondent had violated ERISA in originally denying benefits, and the court ordered a new benefits determination under the threat of an adverse judgment.

This Court's decisions concerning remands and attorney's fees in cases under the Social Security Act, although not analogous in every respect, support that conclusion. Under those precedents, a plaintiff is a prevailing party for attorney's fee purposes if she obtains a judgment reversing the agency's denial of Social Security benefits and remanding to the agency for a new decision, regardless of the outcome on remand. See *Shalala* v. *Schaefer*, 509 U.S. 292, 301 (1993). Alternatively, a plaintiff is a prevailing party if a court remands a case for further proceedings without reaching the merits of the agency decision denying benefits and, subsequently, one of two events occurs: the agency grants benefits on remand or the court enters a favorable judgment after the proceedings on remand are completed. *Id.* at 300. Petitioner here would be deemed a prevailing

party by analogy to either of those scenarios under the Social Security Act.

B. Because petitioner could satisfy the traditional "prevailing party" standard, *a fortiori* she is eligible for attorney's fees under the more flexible test derived from trust law. A contrary conclusion would allow ERISA plan administrators to deny a meritorious benefits claim in the plan's review proceedings and then oppose the claim in a federal action, yet insulate themselves from any award of attorney's fees—all because the district court gave the administrators the task of reconsidering the benefits claim upon finding that they had committed legal error. There may be circumstances, however, in which a district court decides that a remand alone is insufficient to justify a fee award after weighing the relevant factors.

ARGUMENT

Petitioner obtained a court order finding that respondent had violated the law in denying her benefits and requiring that respondent reconsider her claim; petitioner then was awarded benefits as a result of that reconsideration. Despite her success, the court of appeals held that petitioner is categorically ineligible for attorney's fees under ERISA Section 502(g)(1). The court of appeals erred in two respects. First, Section 502(g)(1), which is premised on trust-law principles, does not impose a strict "prevailing party" requirement. Second, even if it did, the unquestionable success that petitioner achieved through her suit would satisfy that requirement.

I. ERISA SECTION 502(G)(1) DOES NOT IMPOSE A STRICT "PREVAILING PARTY" REQUIREMENT

A. The Statutory Text, Context, And History Establish That Attorney's Fees May Be Awarded Under Section 502(g)(1) Without Regard To Strict "Prevailing Party" Status

1. ERISA Section 502(g)(1) provides that "[i]n any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the [district court] in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. 1132(g)(1). Like a number of other fee-shifting provisions, the language of Section 502(g)(1) confers on district courts "discretion" to allocate attorney's fees—to be exercised by considering factors "faithful to the purposes of the" statute. *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994). Unlike the great majority of other fee-shifting provisions, however, Section 502(g)(1) makes no mention of "prevailing party" status. See *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 684 (1983) (noting that "virtually every one of the more than 150 existing federal fee-shifting provisions" contains an express requirement of success by the claimant—*e.g.*, "prevailing party," "substantially prevailing" party, or "successful" party).

Section 502(g)(1)'s lack of "prevailing party" or related language stands in stark contrast to fee-shifting provisions not only in many other federal statutes, but also within ERISA itself. In 1981, Congress amended ERISA Section 502(g) to add Paragraph (2), which is applicable to actions by a plan fiduciary to recover delinquent contributions. See Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, § 306, 94

Stat. 1208. At the same time, Congress excluded such actions from Section 502(g)(1). *Ibid.* Section 502(g)(2), in contrast to Section 502(g)(1), provides for an award of attorney's fees and costs against the defendant when "judgment in favor of the plan is awarded." 29 U.S.C. 1132(g)(2). Title IV of ERISA, which governs terminations of defined benefit pension plans, contains two other attorney's fees provisions—both of which contain an express "prevailing party" requirement. See 29 U.S.C. 1370(e)(1), 1451(e) (reproduced App., *infra* 3a-4a). Similarly, Title IV further permits the court, in an action against the Pension Benefit Guaranty Corporation (PBGC), to award "costs and expenses * * * to any party who prevails or substantially prevails in such action." 29 U.S.C. 1303(f)(3).[2]

Congress's use of "prevailing party" or comparable success-related language in every fee-shifting provision within ERISA except Section 502(g)(1) bespeaks a deliberate choice. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) ("The contrast between the language used in the two standards * * * certainly indicate[s] that Congress intended the two standards to differ."). An "assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.'" *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 146 (1985) (quoting *Nachman Corp.* v. *Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980)).

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[2] Courts have held that awards of "costs and expenses" in Title IV suits against the PBGC do not include attorney's fees. See, *e.g.*, *Stephens* v. *US Airways Group*, 555 F. Supp. 2d 112, 121-122 (D.D.C. 2008).

2. The purpose and history of Section 502(g)(1) reinforce the conclusion that Congress's omission of a "prevailing party" requirement was deliberate.

a. As noted above (pp. 1-2, *supra*), ERISA was designed to provide plan beneficiaries with ready access to courts to help protect their rights. 29 U.S.C. 1001(b); see, *e.g.*, S. Rep. No. 127, 93d Cong. 1st Sess. 35 (1973) (ERISA's enforcement provisions are "designed specifically to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of [ERISA]. * * * The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants."); *Meredith* v. *Navistar Int'l Transp. Corp.*, 935 F.2d 124, 128-129 (7th Cir. 1991) ("[W]e must keep in mind ERISA's essential remedial purpose: to protect beneficiaries of pension plans."). "[I]n answer to a possible concern that attorney's fees might present a barrier to maintenance of suits for small claims, thereby risking underenforcement of beneficiaries' statutory rights," Congress authorized the award of attorney's fees under Section 502(g)(1). *Russell*, 473 U.S. at 147. Allowing fee awards to plaintiffs even in some circumstances in which a strict "prevailing party" requirement is not satisfied thus furthers the statutory purpose.

b. One of ERISA's statutory predecessors was the Welfare and Pension Plans Disclosure Act, 29 U.S.C. 301 *et seq.* See *Jordan* v. *Federal Express Corp.*, 116 F.3d 1005, 1012-1013 (3d Cir. 1997). As relevant here, that act's fee-shifting provision contained language equiva-

lent to a "prevailing party" requirement: "The court in such action [by any participant or beneficiary] may in its discretion, *in addition to any judgment awarded* to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. 308(c) (repealed 1974) (emphasis added). ERISA Section 502(g)(1) eliminated the requirement that a judgment be awarded in the plaintiff's favor.

ERISA's drafting history shows that the change in language was not merely stylistic. Congress had entertained, but did not ultimately adopt in Section 502(g)(1), various proposals from industry representatives to include a prevailing party standard in ERISA's civil enforcement section. See, *e.g.*, *Welfare and Pension Plan Legislation—Pt. I: Hearings on H.R. 2 and H.R. 462 Before the Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 164, 170 (1973) (American Bankers Ass'n); *id.* at 775-776 (Corporate Fiduciaries Ass'n of Illinois); *id.* at Pt. II, at 647-648 (Lauren Upson, Member, California Bankers Association Committee On Employee Benefit Trusts); *Private Pension Plan Reform—Pt. I: Hearings Before the Subcomm. on Private Pension Plans of the Senate Comm. on Finance*, 93d Cong. 1st Sess. 281 (1973) (Frank Seibert, Vice President, Bank of America). And, as discussed above (pp. 11-12, *supra*), Congress several years later chose to add a success element in new Section 502(g)(2), but did not amend the relevant language in Section 502(g)(1) to do so.

B. Trust Law Principles Do Not Impose A Strict "Prevailing Party" Requirement And Instead Support A More Flexible Approach

1. This Court has explained that trust law principles inform the proper interpretation of ERISA. One of ERISA's purposes was to establish federal standards of trust law and apply them to fiduciary conduct, especially with regard to plan administration. See, *e.g.*, *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110 (1989). Much of ERISA reflects a congressional desire that employee plans be "operated under traditional trust law principles," in order to serve the same kinds of protective goals. *Central States, Se. & Sw. Areas Pension Fund* v. *Central Trans.*, 472 U.S. 559, 570 n.10 (1985). Courts have thus "drawn" on "the law of trusts that 'serves as ERISA's backdrop,'" *Kennedy* v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 871 (2009) (quoting *Beck* v. *Pace Int'l Union*, 551 U.S. 96, 101 (2007)), at least to the extent that trust law is consistent "with the language of the statute, its structure, or its purposes," *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 447 (1999) (internal quotation marks omitted).

2. Fee awards have long been allowed in trust cases in the exercise of a court's equitable discretion. See, *e.g.*, *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc.*, 421 U.S. 240, 253-254 (1975); *Dardovitch* v. *Haltzman*, 190 F.3d 125, 145 (3d Cir. 1999). Traditionally, courts in trust cases taxed a "common fund" for attorney's fees and costs. See *Alyeska Pipeline*, 421 U.S. at 257; *Trustees* v. *Greenough*, 105 U.S. 527, 536 (1882) (recognizing the Court of Chancery's "long-established control over the costs and charges of the litigation, to be exercised as equity and justice may require, including proper allowances to those who have instituted proceedings for the

benefit of a general fund"). Trust law, however, also allowed courts, in the exercise of equitable discretion, to allocate the obligation to pay fees and costs to a litigant in appropriate circumstances. See, *e.g.*, *Sprague* v. *Ticonic Nat'l Bank*, 307 U.S. 161, 165-166 (1939) ("The sources bearing on eighteenth-century English practice—reports and manuals—uniformly support the power * * * to give * * * as much of the entire expenses of the litigation [including attorney's fees] of one of the parties as fair justice to the other party will permit."); *Dardovitch*, 190 F.3d at 145-146; George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 871, at 195-198 & nn.53-54 (2d ed. rev. 1995) (Bogert) (listing authorities). Consistent with the principle that fee awards may be made to protect trust funds and their beneficiaries pursuant to the flexible "power of equity in doing justice," *Sprague*, 307 U.S. at 167, Section 502(g)(1) expressly provides for an award of attorney's fees from the opposing party in ERISA cases.

Courts in equity are not bound by a strict "prevailing party" requirement in considering fee awards in trust cases, and in certain situations fees have been awarded even when the plaintiff did not receive the relief sought. See, *e.g.*, *Dardovitch*, 190 F.3d at 146 ("[A] trustee may be found liable for a beneficiary's attorney's fees when the trustee has acted wrongfully, * * * [i]n spite of the fact that the beneficiaries did not receive the relief they sought.") (citing *In re Catell's Estate*, 38 A.2d 466 (Del. Ch. 1944));[3] *Daniel* v. *White*, 252 S.E.2d 912, 915

[3] In *In re Catell's Estate*, the trustee failed to give a bond as required by the settlor. The beneficiaries of the trust brought an action to have the trustee removed, but the court refused because the trustee gave the bond after the suit was filed and the trust suffered no loss. The court nonetheless ordered the trustee to pay the beneficiaries' attorney's fees

(S.C. 1979) (awarding attorney's fees to losing plaintiff because he "spent much time and effort in the location of these heirs" to the estate); *In re Bittson's Trust*, 244 N.Y.S.2d 926, 931 (Sup. Ct. 1963) ("The court has requisite power, under [the New York probate statute], to grant an allowance even 'to an unsuccessful litigant [where an issue of construction has been litigated] as the nature and importance of the subject matter and the good faith of the participant may warrant.'") (second brackets in original; citation omitted).

In addition, state statutes relating to trusts provide for flexibility in the award of fees. See Uniform Trust Code § 1004 (2005) (UTC) ("In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.").[4] That flexibility extends to cases in which the fiduciary rather than the trust is being charged with the opposing party's expenses. See, *e.g.*, *Dardovitch*, *supra*; *Marshall* v. *Babson Inst.*, 254 N.E.2d 886, 890 (Mass. 1970) (remanding to probate court for consideration of attorney's fees against trustees despite finding that, while trustees had been stingy, their discretion had not "quite" been abused); *Crutcher* v. *Joyce*, 146 F.2d 518, 521 (10th Cir.

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on the ground that the suit was made necessary only because of the trustee's failure to observe the clear terms of the trust. See 38 A.2d at 470.

[4] UTC Section 1004 is based on the similarly worded Mass. Gen. Laws ch. 215, § 45. See UTC cmt. (2005). That statute has been applied to support an award of attorney's fees against defendants "regardless of the outcome." *Hurley* v. *Noone*, 196 N.E.2d 905, 910 (Mass. 1964).

1945) (assessing fees against trustee and counsel even though plaintiffs prevailed on only minor issues).

3. Section 502(g)(1)'s omission of a strict "prevailing party" requirement reflects the flexible approach of trust law, based on the sound exercise of equitable discretion. Consistent with that tradition, courts of appeals uniformly apply in Section 502(g)(1) cases some form of the test used by the district court in this case, taking account of five relevant factors. Pet. App. 16a-17a; see *Eddy* v. *Colonial Life Ins. Co.*, 59 F.3d 201, 206 & n.10 (D.C. Cir. 1995) (collecting cases); cf. *Sullivan* v. *William A. Randolph, Inc.*, 504 F.3d 665, 671 (7th Cir. 2007) (referring to the five-factor test as an attempt to structure or implement a "substantially justified" standard). The five factors, illustrative rather than exclusive, are (1) the degree of culpability or bad faith; (2) ability to pay; (3) the potential for deterrence; (4) the number of persons benefitted or the significance of the legal question raised; and (5) the relative merits of the parties' positions. Pet. App. 16a-17a. Those factors, rather than a strict "prevailing party" standard, properly guide the discretion of district courts in making fee determinations under Section 502(g)(1). As in equity, the "guidelines" provided by these factors, *e.g.*, *Gray* v. *New England Tel. & Tel. Co.*, 792 F.2d 251, 258 (1st Cir. 1986), "flow[] naturally from the importance of preserving flexibility in this area of the law," *Cottrill* v. *Sparrow, Johnson & Ursillo, Inc.*, 100 F.3d 220, 226 (1st Cir. 1996).

The factors generally taken into account by the courts under Section 502(g)(1), like the text of that Section, do not embody a "prevailing party" requirement, but rather provide broader discretion in awarding fees. But that discretion of course has limits. An award of fees would almost never be appropriate under Section

502(g)(1) when a party was wholly unsuccessful in obtaining any favorable determination for herself or for participants and beneficiaries of the plan more broadly. See, *e.g.*, *Gibbs* v. *Gibbs*, 210 F.3d 491, 504 (5th Cir. 2000) ("[G]enerally, a proper analysis of the five factors will in most instances favor an award of fees to the party which has most substantially prevailed."); *Doe* v. *Travelers Ins. Co.*, 167 F.3d 53, 61 (1st Cir. 1999) (Section 502(g)(1) fee awards "are normally for the prevailing party, if at all."); but cf. *Antolik* v. *Saks, Inc.*, 463 F.3d 796, 803 (8th Cir. 2006) (leaving as "an open issue" whether defendant's "deceptive behavior and flagrant disregard of its ERISA disclosure duties may make this the rare case where some modest award is appropriate" even though plaintiffs were not entitled to relief on the merits).

4. Reliance on the five-factor inquiry under ERISA Section 502(g)(1), without a strict "prevailing party" prerequisite, is consistent with this Court's decision in *Ruckelshaus* v. *Sierra Club*, *supra*. The question presented in *Ruckelshaus* was whether a completely losing party could recover attorney's fees under Section 307(f) of the Clean Air Act, 42 U.S.C. 7607(f), which permits a fee award "whenever [the court] determines that such award is appropriate." The court of appeals applied that provision to award attorney's fees to the *Ruckelshaus* plaintiff for its contributions to the goals of the Clean Air Act, even though the plaintiff had lost on every claim presented in its petition for review of various EPA actions. 463 U.S. at 682.

This Court reversed. It demanded clear evidence before imputing to Congress an intent to make such a radical departure from the American Rule as requiring the winning party to pay the losing party's fees, espe-

cially in light of the sovereign immunity considerations implicated by Section 307(f)'s potential application to fee awards against the United States. *Ruckelshaus*, 463 U.S. at 683-686. At the same time, the Court acknowledged that Congress's omission of "prevailing party" language was meant "to expand the class of parties eligible for fee awards." *Id.* at 688. Accordingly, the Court concluded that "the term 'appropriate' modifies but does not completely reject the traditional rule that a fee claimant must 'prevail' before it may recover attorney's fees." *Id.* at 685-686. Unlike in the application of the traditional "prevailing party" requirement, a fee award could be "appropriate" under the Clean Air Act provision as long as there was "some degree of success." *Id.* at 694.

Like the Clean Air Act provision in *Ruckelshaus*, ERISA Section 502(g)(1) omits any reference to a "prevailing party." And as was the case in *Ruckelshaus* (see 463 U.S. at 686-690), the legislative context and history of ERISA indicate that the omission was meant to establish a more generous standard for awarding attorney's fees (see pp. 13-14, *supra*).[5] Here, moreover, Section 502(g)(1) should be interpreted in light of the distinct trust-law principles that serve as a backdrop to ERISA. As discussed above (pp. 15-18 , *supra*), trust law invokes the traditional flexibility of equity law and permits the

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[5] In addition, the United States is rarely a proper defendant in a Section 502 enforcement action, and is not one of the plaintiffs enumerated in Section 502(g)(1). See, *e.g* , *Donovan* v. *Dillingham*, 668 F.2d 1196, 1198 (11th Cir.), modified on other grounds on reh'g en banc, 688 F.2d 1367 (11th Cir. 1982)). Because the United States will rarely, if ever, be subject to a fee award under Section 502(g)(1), the sovereign immunity concerns that counseled in favor of the interpretation of the Clean Air Act in *Ruckelshaus* are much less significant here.

award of attorney's fees without reliance on rigid rules. The approach developed by the lower courts, looking to the five factors described above in making fee awards under Section 502(g)(1) (see pp. 18-19, *supra*), captures the flexibility of equity within the context of ERISA.

II. AN ERISA CLAIMANT WHO OBTAINS A COURT ORDER FINDING AN ERROR AND REQUIRING A CLAIMS ADMINISTRATOR TO REDETERMINE BENEFITS, AND WHO IS SUBSEQUENTLY GRANTED BENEFITS BY THE ADMINISTRATOR, IS ELIGIBLE FOR ATTORNEY'S FEES UNDER SECTION 502(g)(1)

For the reasons explained in Part I, Section 502(g)(1) should not be interpreted to incorporate by implication the traditional "prevailing party" standard, as interpreted in *e.g.*, *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001). Rather, this Court should ratify, without a strict "prevailing party" prerequisite, the flexible five-factor test distilled from trust-law principles and employed in the lower courts to determine the propriety of a fee award under Section 502(g)(1). But even if the *Buckhannon* standard applies, petitioner—who obtained a court order finding that respondent violated ERISA and requiring respondent to redetermine benefits eligibility in accordance with the court's opinion, and who was granted benefits as a result of that redetermination —should receive attorney's fees.

A. Petitioner's Success In This Case Satisfies The Traditional "Prevailing Party" Requirement

Given that the vast majority of fee-shifting statutes contain an explicit "prevailing party" requirement, most of this Court's pronouncements on the propriety of a fee award interpret that traditional standard. Contrary to

the Fourth Circuit's decision (Pet. App. 10a-11a), neither *Buckhannon* nor any other decision of this Court requires a view of "prevailing party" status so cramped as to preclude an award of attorney's fees in the circumstances of this case.

1. *Buckhannon* presented the question whether a party could be deemed "prevailing" under a "catalyst theory." On that theory, a fee award would be permissible if the defendant responded to a suit by voluntarily providing the requested relief. 532 U.S. at 600-601. In *Buckhannon*, the plaintiffs sued state officials who had ordered the closure of residential group homes pursuant to an allegedly discriminatory state-law requirement. While the litigation was pending, the state legislature eliminated the relevant requirement, and the district court granted defendants' motion to dismiss the case as moot. *Id.* at 601. The plaintiffs argued that they were entitled to attorney's fees as "prevailing parties" because their suit had operated as a "catalyst" by bringing "about a voluntary change in the defendant's conduct." *Ibid.* The Court rejected that argument. The Court concluded that Congress employed the term "prevailing party" as "a legal term of art," and held that the term cannot be read to "authorize[] federal courts to award attorney's fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the 'sought-after destination' without obtaining any judicial relief." *Id.* at 603, 606 (citation omitted).

The Court contrasted such a "catalyst" case with cases in which a judicial determination had occurred. The Court noted its prior holdings that both "judgments on the merits" and "settlement agreements enforced through a consent decree may serve as the basis for an

award of attorney's fees," because they "create '[a] material alteration of the legal relationship of the parties." 532 U.S. at 603-604 (quoting *Texas State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-793 (1989)). The Court also indicated, in discussing the Eighth Circuit's decision in *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 429-430 (1970) (which the Court characterized as "consistent with [its] holding in *Farrar* [v. *Hobby*, 506 U.S. 103 (1992)]"), that when a court determines "that the defendant had acted unlawfully," and the court "retain[s] jurisdiction over the matter for a reasonable period of time to ensure" compliance, the plaintiff has prevailed in the relevant sense. *Buckhannon*, 532 U.S. at 607-608 n.9.

That is essentially what happened in this case. Here, as in a typical benefit suit brought under ERISA Section 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B), the issue to be resolved by the court was whether the claims administrator, in denying benefits, abused its discretion or issued a decision unsupported by substantial evidence. See *Metropolitan Life Ins. Co.* v. *Glenn*, 128 S. Ct. 2343 (2008). Because the district court concluded that respondent's decision "was not based on substantial evidence" and "failed to comply with the ERISA guidelines" (Pet. App. 47a, 48a), the court found that respondent had acted unlawfully. The district court thus ordered respondent to redetermine petitioner's eligibility for benefits in accordance with its opinion and under the threat of an adverse judgment. That finding and order constitute "'[a] material alteration of the legal relationship of the parties'" with the "necessary judicial imprimatur." *Buckhannon*, 532 U.S. at 604-605 (quoting *Garland Indep. Sch. Dist.*, 489 U.S. at 792-793). Under *Buckhannon*'s reasoning, that makes petitioner a "prevailing

party." Petitioner's receipt of benefits as a result of the court-ordered reconsideration removes any doubt that she prevailed. See *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 (1983) ("[P]laintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.") (quoting *Nadeau* v. *Hedgemoe*, 581 F.2d 275, 278-279 (1st Cir. 1978)).

2. This Court's analysis of the attorney's fee issue in cases involving remands under the Social Security Act, although not directly applicable, supports the same conclusion. In *Shalala* v. *Schaefer*, 509 U.S. 292 (1993), a Social Security disability claimant sought fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), which provides for an award of attorney's fees in specified circumstances to a "prevailing party" in a civil action against the government. This Court held that a claimant who obtains a decision vacating a denial of Social Security benefits pursuant to "sentence four" of 42 U.S.C. 405(g)—under which the district court enters "a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing"—is a "prevailing party" for EAJA purposes regardless whether she ultimately obtains benefits on remand. *Schaefer*, 509 U.S. at 301. But a different approach to the fee issue is called for when a court remands a case pursuant to "sentence six" of 42 U.S.C. 405(g), which may be done only "on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer" or for consideration of "new evidence which is material [where] there is good cause for the failure to incorporate such evidence into the re-

cord in a prior proceeding." When a court orders a remand of that sort, it does not rule on the merits of the claim for benefits, but rather "retains jurisdiction of the civil action pending the completion of the administrative proceedings." *Schaefer*, 509 U.S. at 300. Under that scenario, the plaintiff becomes a prevailing party only if she receives an award of benefits in the administrative proceedings pursuant to the limited remand, or if the court enters a final judgment in her favor after the remand proceedings are completed. *Id.* at 300 & n.4.

Although not fitting precisely into the categories envisioned by *Schaefer* and the Social Security Act in this case,[6] this case is analogous to a case adjudicated under sentence four of 42 U.S.C. 405(g). As in a sentence four

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[6] The principles governing procedural review of Executive agency action, such as those embodied in 42 U.S.C. 405(g), are not directly applicable in the ERISA context. See *Glenn*, 128 S. Ct. at 2353-2354 (Roberts, C.J., concurring in part and concurring in the judgment). And as relevant here, there are several textual differences between the Social Security Act regime and Section 502 of ERISA. While 42 U.S.C. 405(g) authorizes judicial review of "any final decision of the Commissioner of Social Security," Section 502(a)(1)(B) of ERISA authorizes a claimant to bring suit specifically "to recover benefits" or "to enforce his rights under the terms of the plan." 29 U.S.C. 1132(a)(1)(B). The Social Security Act expressly provides for a "remand," which formally returns the case to the Executive Branch. ERISA Section 502(a)(1)(B), by contrast, does not expressly provide for a "remand," and the matter is returned not to the Executive Branch but to a private entity that often has a financial interest in the outcome. See *Glenn*, 128 S. Ct. at 2349-2350; *Brown* v. *Blue Cross & Blue Shield of Ala., Inc.*, 898 F.2d 1556, 1564 n.7 (11th Cir. 1990), cert. denied, 498 U.S. 1040 (1991) ("[T]he individuals who occupy the position of ERISA fiduciaries are less well-insulated from outside pressures than are decisionmakers at government agencies."). The use of the "remand" procedure in ERISA cases therefore is properly viewed as an exercise of the court's general equitable discretion under ERISA Section 502 to dispose of the case fairly in furtherance of the provisions and purposes of ERISA.

case, in which the court finds error in the Commissioner's decision denying Social Security benefits and remands for reconsideration under the proper standards, the court in this case found error in respondent's decision denying plan benefits and remanded for reconsideration in accordance with its opinion. The principal distinction is that the court here did not enter a final judgment upon issuance of its remand order, as 42 U.S.C. 405(g) requires in a sentence four case. Instead, the court retained jurisdiction, stating that "judgment will be issued in favor of [petitioner]" if respondent did not timely act on petitioner's benefits application in accordance with the court's opinion. Pet. App. 49a. Only after respondent granted petitioner benefits on reconsideration did the district court enter judgment in favor of petitioner, and then only on the fee award. *Id.* at 30a.

But that distinction, when viewed in light of trust-law principles, does not warrant a substantially different application of the "prevailing party" standard under Section 502(g)(1) of ERISA—assuming the Court holds that standard applies—than in sentence four remands under the Social Security Act. Under trust law, equity courts did not enter judgment and "remand" cases in the same sense as when a court sends a case back to an agency or lower court. Instead, equity courts sometimes used a procedure (called a "reference") to send back a case to a trustee while retaining jurisdiction. More specifically, if a court found that a trustee had abused a discretionary power, the court could, in its discretion, "order a new decision to be made in the light of rules expounded by the court." Bogert § 560, at 222; see 3 Austin Wakeman Scott, et al., *Scott & Ascher on Trusts* § 18.2.1, at 1348-1349 (5th ed. 2007). While that determination was ongoing, equity courts could retain jurisdic-

tion, including for the purpose of determining fees and costs and otherwise settling the trust's accounts. See, *e.g.*, *In re Haupt's Estate*, 252 P. 597, 599 (Cal. 1926); cf. *Lingo* v. *Lingo*, No. 4483-s, 2009 WL 623720, *15 (Del. Ch. Feb. 26, 2009) (retaining jurisdiction to supervise interim trustee appointed to "determine how best to proceed to recover the amounts which [the faithless trustee] should repay to [the trust]"). Such practice follows from the general principle that "[o]nce invoked, equity retains jurisdiction over the entire action to see that complete relief is administered." *In re Estate of Archambault*, 520 A.2d 154, 154 (Vt. 1986). Accordingly, notwithstanding the retention of jurisdiction, a court may treat a case like this one as sufficiently analogous to a "sentence four" remand in a Social Security case under 42 U.S.C. 405(g)—and regard the plaintiff as sufficiently prevailing at the time of the order to the trustee to redetermine benefits—for the plaintiff to be eligible for an award of fees under ERISA Section 502(g)(1).[7]

And even if this Court were to decide that the "sentence six" framework under 42 U.S.C. 405(g) is a better analogy (because of the court's retention of jurisdiction on remand), petitioner still would be eligible for a fee award. In a sentence six case, as noted above, a party

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[7] Of course, not all remands automatically confer "prevailing party" status. In the administrative law context, if a court retains jurisdiction and issues a limited remand to an agency for a better explanation of a particular issue or consideration of new evidence, without vacating the underlying decision (as in a "sentence six" remand in a Social Security Act case under 42 U.S.C. 405(g)), the remand order alone does not mean the claimant has "prevailed." That is because (unlike here) there is no judicial finding that the claimant was correct or that the agency erred; such remands are used to obtain more information prior to the court rendering a decision on the merits.

becomes "prevailing" only after a favorable benefits determination by the claims adjudicator on remand (or by the court following the remand). Here, respondent granted petitioner's benefits claim as a result of the court-ordered reconsideration, so the prerequisite for the court to find "prevailing party" status in sentence six cases is satisfied. Thus, under either analogy to the Social Security cases, petitioner was entitled to attorney's fees.[8]

3. As the Court concluded in *Schaefer* (509 U.S. at 301-302), other decisions rejecting assertions of "prevailing party" status are distinguishable from this case. In *Hanrahan* v. *Hampton*, 446 U.S. 754 (1980), the Court rejected plaintiffs' claim of "prevailing party" status because they had obtained only reversal of a directed verdict during the litigation—that is, only a procedural ruling that kept their suit alive. *Id.* at 758-759.

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[8] The courts of appeals are in conflict on whether a district court "remand" to a plan administrator in an ERISA case produces an appealable judgment. The First, Sixth, Eighth, and Eleventh Circuits have held that such orders are non-final. See *Gerhardt* v. *Liberty Life Assurance Co.*, 574 F.3d 505, 511-512 (8th Cir. 2009); *Bowers* v. *Sheet Metal Workers' Nat'l Pension Fund*, 365 F.3d 535, 537 (6th Cir. 2004); *Petralia* v. *AT&T Global Info. Solutions Co.*, 114 F.3d 352, 353-354 (1st Cir. 1997); *Shannon* v. *Jack Eckerd Corp.*, 55 F.3d 561, 563-564 (11th Cir. 1995). The Seventh Circuit has held that they constitute final appealable orders. See *Perlman* v. *Swiss Bank Corp. Comprehensive Disability Prot. Plan*, 195 F.3d 975, 977-980 (1999). The Ninth and Tenth Circuits have taken an intermediate, case-by-case approach, focusing on whether review would effectively be foreclosed after remand. See *Metzger* v. *UNUM Life Ins. Co.*, 476 F.3d 1161, 1164-1165 & n.1 (10th Cir. 2007); *Hensley* v. *Northwest Permanente P.C. Ret. Plan & Trust*, 258 F.3d 986, 994 (9th Cir. 2001), cert. denied, 534 U.S. 1082 (2002). For the reasons stated in the text, however, resolution of that conflict should not affect the availability of a fee award under Section 502(g)(1).

By contrast, petitioner here obtained a determination that the claims administrator had committed legal error and an effective vacatur of the underlying decision. In *Hewitt* v. *Helms*, 482 U.S. 755 (1987), this Court held that a plaintiff did not become a "prevailing party" merely by obtaining "a favorable judicial statement of law in the course of litigation that resulted in judgment *against the plaintiff*." *Id.* at 763 (emphasis added). Not only is there no judgment against petitioner in this case, but she obtained the result she had sought in every respect.

The Fourth Circuit's suggestion (Pet. App. 11a) that petitioner's lack of a request for a remand in her complaint defeats "prevailing party" status is also unavailing. Resolving this ERISA benefits case on that ground would be overly formalistic: a decision finding that the administrator's benefits denial was erroneous and requiring a redetermination based on all the pertinent evidence, while less than the outright award of benefits that petitioner expressly sought, is at least partial relief. Cf. *United States* v. *Denedo*, 129 S. Ct. 2213, 2219-2220 (2009) (construing the term "relief" in 28 U.S.C. 1259(4) to encompass "any 'redress or benefit' provided by a court" and not just "ultimate relief" or "complete relief," noting that "courts reverse and remand lower court judgments—rather than issuing complete relief—with regularity"). In any event, petitioner not only alleged numerous procedural deficiencies in respondent's denial of benefits, J.A. 99a-105a,[9] but also requested, in addition to an award of past benefits due and a declaration

[9] Although the complaint does not explicitly allege a violation of either ERISA Section 503 or its claims-review regulations (see pp. 2-3, *supra*), the complaint implicitly does so as part of its allegations that respondent wrongfully denied her benefits.

of her entitlement to future benefits, "such other relief as the Court may deem necessary and proper to secure Plaintiff's rights." J.A. 109a-110a. The "remand" to the claims administrator, with instructions to adequately consider all of the evidence discussed in the court's opinion (Pet. App. 49a), fits comfortably within that residual clause.

B. An Award Of Fees Is Not Automatic Under The Five-Factor Test

Because petitioner could satisfy the traditional "prevailing party" standard, *a fortiori* she is eligible for attorney's fees under both the looser *Ruckelshaus* standard and the more flexible five-factor test derived from trust law and applied by the lower courts under ERISA.

Petitioner's eligibility for attorney's fees under *Ruckelshaus* is evident from that decision's discussion of relief obtained other than pursuant to a court order. The Court explained that by omitting the term "prevailing party," Congress had "reject[ed] the restrictive notions of 'prevailing party' adopted in *Pearson* [v. *Western Electric Co.*, 542 F.2d 1150 (10th Cir. 1976)]," which held that a litigant who obtained full relief from the defendant was not a "prevailing party" because the relief was not obtained through a court order. *Ruckelshaus*, 463 U.S. at 689-690. And in addressing certain legislative history, the Court acknowledged that the Clean Air Act provision "extended to suits that forced defendants to abandon illegal conduct, although without a formal court order." *Id.* at 686 n.8. *Ruckelshaus* thus indicates that, if a fee-shifting statute does not contain "prevailing party" language, a defendant's change in conduct prompted by the filing of a suit rather than by judicial decree might support a fee award in appropriate circum-

stances. See, *e.g.*, *Sierra Club* v. *EPA*, 322 F.3d 718 (D.C. Cir. 2003), cert. denied, 540 U.S. 1104 (2004). Given that discussion, there should be no question that an award of fees was permissible here. After all, petitioner secured benefits because of a *court-ordered* reconsideration by the claims administrator following a decision that the administrator had violated ERISA. The standard set forth in *Ruckelshaus* is therefore satisfied.

In any event, under our proposed framework, a court in ERISA fee-shifting cases need apply only the five-factor test set forth above (see pp. 18-19, *supra*). Petitioner would at the least be eligible for attorney's fees under that flexible inquiry. As the petition for certiorari points out (Pet. 11), respondent "did not appeal the district court's use or application of the five factor test." Nor is it evident from the record that the district court abused its discretion in that regard.

A decision that petitioner is not eligible for attorney's fees would have unfortunate consequences. Such a conclusion would allow ERISA plan administrators to deny a meritorious benefits claim in the plan's review proceedings and then oppose the claim in a federal action, yet insulate themselves from any award of attorney's fees—all because the district court delegated the task of reconsidering the benefits claim to the administrators upon finding that they had committed legal error. Such a rule would create incentives for ERISA plan administrators to deny claims until under an imminent threat of adverse judgment, and thus would run counter to ERISA's purpose of protecting beneficiaries. Given that Section 502(g)(1) omits any "prevailing party" language, this Court should not interpret the provision in that manner.

That is not to say that a court must award fees under Section 502(g)(1) in every case in which a court orders a remand to the claims administrator for reconsideration. Rather, the proper five-factor inquiry permits the court to consider all the relevant circumstances. A determination as to the relative merits of the parties' positions, for example would be informed by whether the court found an abuse of discretion in the initial denial of benefits and whether the claimant ultimately obtained the benefits sought. And other factors, such as the ability of the opposing party to pay and whether the court's ruling could be expected to have effects beyond the claim of the particular plaintiff, could also affect the propriety of a fee award.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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MARCH 2010

APPENDIX

1. 29 U.S.C. 1132 provides in pertinent part:

Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

* * * * *

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may

allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

* * * * *

2. 29 U.S.C. 1133 provides:

Claims procedure

In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

3. 29 U.S.C. 1370 provides in pertinent part:

Enforcement authority relating to terminations of single-employer plans

* * * * *

(e) Awards of costs and expenses

(1) General rule

In any action brought under this section, the court in its discretion may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to any party who prevails or substantially prevails in such action.

* * * * *

4. 29 U.S.C. 1451 provides in pertinent part:

Civil actions

* * * * *

(e) Costs and expenses

In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party.

* * * * *

5. 42 U.S.C. 7607 provides in pertinent part:

* * * * *

(f) Costs

In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
MAR 4 - 2010
OFFICE OF THE CLERK

No. 09-448

In the Supreme Court of the United States

BRIDGET HARDT,

Petitioner,

v.

RELIANCE STANDARD LIFE INSURANCE COMPANY,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF OF AARP AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AS *AMICI CURIAE*, IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

AARP is the largest nonpartisan, nonprofit organization representing the interests of people age 50 and older. AARP helps people over age 50 have independence, choice, and control in ways that are beneficial and affordable to them and society. Nearly half of AARP's members are employed full or part-time, with many working for employers that provide health, pension, and disability benefit plans covered by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq*.

Through education, advocacy, and service, and by promoting independence, dignity, and purpose, AARP seeks to enhance the quality of life for all. In its efforts to foster the economic security of individuals as they age, AARP seeks to increase the availability, security, equity, and adequacy of public and private pensions, health, and other employee benefits.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, and civil rights disputes. NELA and its

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[1] Counsel for AARP and NELA state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

68 state and local affiliates have a membership of over 3,000 attorneys committed to working for those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.[2]

Potential awards of statutory attorneys' fees protect participants' ERISA rights by enabling them to obtain the assistance of attorneys, despite the fact that the modest amounts at stake render contingent fee arrangements infeasible.[3] Moreover, such awards motivate plans and insurers to conduct full and fair reviews of benefit claims and deter them from abusing the claims procedure.[4] Accordingly,

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[2] As part of their advocacy efforts to ensure, to the greatest extent possible, that participants and beneficiaries receive the benefit of ERISA's protections, AARP and NELA, either singly or jointly, have participated as *amicus curiae* in numerous cases in the Court and in federal appellate courts involving ERISA's preemption, civil enforcement and claims procedure provisions. *See, e.g., Metro. Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008); *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004); *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003); *Great-West Life Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993); *Firestone Tire & Rubber Co v. Bruch*, 489 U.S. 101 (1989).

[3] The term "participants" herein also includes "beneficiaries."

[4] *Amici*'s brief focuses on the award of attorneys' fees in actions for denial of benefit claims. Many of the issues surrounding benefit claim denials do not arise in actions concerning fiduciary breach and other statutory claims. For example, remands to the plan administrator are rare in such cases for the simple reason that there is no statutory mandate that the

resolution of the issues in this case will have a significant impact on the integrity of the administration of employee benefit plans and individual participants' abilities to obtain their benefits, thereby fostering their economic security. In light of the significance of the issues presented by this case, AARP and NELA respectfully submit this brief, as *amici curiae,* to facilitate a full consideration by the Court of these issues.

SUMMARY OF ARGUMENT

Although Congress explicitly stated that the reasons for the enactment of the Employee Retirement Income Security Act (ERISA) were to protect participants' benefits and to provide access to court, judicial precedent has erected significant hurdles to those rights. Only after a participant or beneficiary has exhausted the remedies available under the plan have courts permitted a participant to go to court under ERISA to attempt to obtain their benefits that have been denied. *E.g., Smith v. Sydnor,* 184 F.3d 356, 363-65 (4th Cir. 1999). Legal costs incurred during pre-trial exhaustion of the plan's review procedures are not recoverable. *E.g., Parke v. First Reliance Standard Life Ins. Co.,* 368

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plan provide an pre-litigation review procedure for statutory violations of ERISA, *compare with* Section 503; adjudication of a statutory violation does not require the expertise of the plan administrator but of the judiciary; and the plan generally cannot provide the remedy the participants are seeking. *E.g., Smith v. Sydnor,* 184 F.3d 356, 363-65 (4th Cir. 1999); *Chailland v. Brown & Root, Inc.,* 45 F.3d 947 (5th Cir. 1997); *but see Mason v. Cont'l Group, Inc.,* 763 F.2d 1219, 1227 (11th Cir 1985).

F.3d 999, 1010 (8th Cir. 2004). Once suit is brought, courts will defer to the decision of the plan administrator unless, the participant can show that, on the written record developed during the pre-litigation review procedure, the benefits were denied arbitrarily and capriciously, the plan administrator violated its fiduciary obligations under ERISA, or there is some other substantive breach of ERISA's requirements. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). Even where a court finds that the plan administrator has arbitrarily and capriciously denied the participants' benefits, it is not uncommon for courts to remand the case to the plan administrator to redetermine the claim. *E.g.*, *Buffonge v. Prudential Ins. Co. of Am.*, 426 F.3d 20, 31 (1st Cir. 2005).

Under the Fourth Circuit's decision, despite a finding that the plan administrator denied benefits in violation of ERISA and despite the claimant's subsequent recovery of benefits, the court nonetheless reached the remarkable conclusion that Hardt was not a "prevailing party," a judicially imposed prerequisite to an award of fees under ERISA that is entirely absent from the statute.[5] *Hardt v. Reliance Standard Life Ins. Co.*, 336 Fed. Appx. 332, 335-36 (4th Cir. 2009).

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5 *Amici* agrees with Petitioner's arguments that ERISA does not require a party to be "prevailing" in order to be considered for attorneys' fees, but, in any event, winning a remand to the plan administrator is "prevailing." *Amici* will confine their brief to the policy reasons warranting that the Court agree with Petitioner's arguments.

Instead, the Fourth Circuit requires the court to grant the participants' ultimate request – an award of benefits – in order for a participant to be a "prevailing party" under ERISA, and thus be eligible for consideration to receive discretionary attorneys' fees. *Id.*

The interaction between the Fourth Circuit's decision and existing judicial precedent limiting the § 502(a)(1)(B) and § 502(g)(1) rights of participants, coupled with both the modest benefits at issue and the limited means of most participants, will not only restrict awards of attorneys' fees in ERISA cases but, even more significantly, essentially preclude many participants from bringing a benefits claim under § 502(a)(1)(B).

ARGUMENT

I. ALTHOUGH CONGRESS ENACTED ERISA SO THAT PARTICIPANTS COULD RECEIVE THE BENEFITS TO WHICH THEY ARE ENTITLED, THE FOURTH CIRCUIT'S STRICT "PREVAILING PARTY" REQUIREMENT, WHEN CONSIDERED TOGETHER WITH EXISTING JUDICIAL PRECEDENT, WOULD DRASTICALLY LIMIT THE APPLICABILITY OF § 502(g)(1).

A. ERISA Explicitly Provides A Means To Obtain Wrongfully Denied Benefits And Attorneys' Fees.

Congress enacted ERISA to protect participants' and beneficiaries' interests in employee benefit plans by setting out substantive regulatory requirements, including standards of conduct, responsibility, and obligation for fiduciaries, and by providing for appropriate remedies, sanctions, and ready access to the courts. ERISA § 2(b), 29 U.S.C. § 1001(b); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 264 (1993).

Among the safeguards that Congress enacted was a claims procedure intended to resolve disputes over benefit claims prior to litigation. ERISA § 503, 29 U.S.C. § 1133. Section 503 provides that when a participant's claim for benefits has been denied, a benefit plan shall provide adequate written notice to the participant, setting forth the specific reasons for

the denial in a manner to be understood by the participant. *Id.* Section 503 also states that the plan shall provide the participant with a reasonable opportunity for a full and fair review of the benefit denial. *Id.*

Congress also recognized that, despite the pre-litigation plan review procedures of Section 503, plans might still deny participants the benefits to which they were entitled under ERISA. To address such situations, Congress enacted Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), which provides that a participant or beneficiary may bring a "civil action . . . to recover benefits due to him under the terms of his plan [or] to enforce his rights under the terms of the plan." *See Salovaara v. Eckert*, 222 F.3d 19, 28 (2d Cir. 2000) ("private actions by beneficiaries seeking in good faith to secure their rights under employee benefits plans are important mechanisms for furthering ERISA's remedial purpose").

In addition, Section 502(g)(1) of ERISA, 29 U.S.C. § 1132(g)(1), provides that "[i]n any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." The discretionary award of attorneys' fees under § 502(g)(1) serves an important role in the enforcement of ERISA's protections. As the Court recognized in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, one of the reasons Congress chooses to depart from the American Rule of recovery to permit fee-shifting in certain statutory

schemes is "to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation." 421 U.S. 240, 263 (1975). The policy rationales underlying Congress' decision to permit fee-shifting under certain statutes are to assure fairness, to equalize the strengths of the parties, and to provide economic incentives to encourage plaintiffs to bring actions to enforce their rights, as well as to encourage attorneys to practice in a particular area of law. *See generally* A. Bertino, *The Need for a Mandatory Award of Attorneys' Fees for Prevailing Plaintiffs in ERISA Benefits Cases*, 41 CATH. U. L. REV. 871, 877 (1992) [hereinafter "Bertino, *The Need for a Mandatory Award*"].

B. Although The Statutory Language Of ERISA Explicitly Provides Direct Access To Courts, As Well As Discretionary Attorneys' Fees, Without Regard to Whether a Party Prevails, Those Rights Have Been Circumscribed.

Despite ERISA's explicit statutory provisions, a series of judicially crafted limits on § 502(a)(1)(B) and § 502(g)(1) has significantly restricted a participant's access both to the federal courts and to attorneys' fees. *See generally* Bertino, *The Need for a Mandatory Award* at 873-74. In the context of § 502(a)(1)(B) claims challenging the denial of benefits, existing precedent generally: (1) precludes the recovery of punitive and extra-contractual damages; (2) requires plan participants to exhaust pre-litigation plan review procedures prior to gaining

access to court; (3) places heavy emphasis on the written record developed during the pre-litigation review procedure by limiting judicial consideration of the claim to a highly deferential review of the written record; (4) denies consideration for attorneys' fees during the pre-litigation plan review procedures; and (5) frequently results in relief in the form of remand to the plan administrator unless the denial of benefits is unreasonable on the face of the record or there is a substantive violation of ERISA.

1. Plan Participants Exercising Their § 502(a)(1)(B) Rights May Not Recover Punitive Or Extra-Contractual Damages.

Judicial precedent has established that, regardless of whether the benefit claims denial is made in bad faith or whether the plan or insurer engages in consistent, biased claims processing, a court cannot award compensatory, punitive or extra-contractual damages under ERISA. *See generally Great-West Life Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Mertens*, 508 U.S. 248; *Mass Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 144 (1985). *See also* John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials Under ERISA*, 101 NW. U.L. REV. 1315, 1321 (2007) [hereinafter "Langbein, *Unum/Provident Scandal*"] (detailing insurers aggressive claims denial policy adopted because of ERISA's preemptive effect, deferential standard of review and lack of remedies). These decisions have placed significant importance

on the availability of attorneys' fees under ERISA's fee-shifting statute, since these restrictions make contingent fee arrangements infeasible. *See infra* Section II. Consequently, many plan participants of limited means are forced to rely on attorneys' fees under 502(g)(1) in order to receive legal assistance while challenging denials of their benefits.

2. Plan Participants May Not Exercise Their § 502(a)(1)(B) Rights To Bring A Civil Action In Court Until They Have Exhausted The Plan's Pre-litigation Review Procedures.

Although "ERISA is silent as to whether exhaustion of administrative remedies is a prerequisite to bringing a civil action [for denial of benefits claims] . . . , due to ERISA's provision for the administrative review of benefits, ten federal circuits have read an exhaustion of administrative remedies requirement into the statute." *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 418 (6th Cir. 1998). *See also Sydnor*, 184 F.3d at 363-65 ("the courts of appeals are in near unanimity that exhaustion of administrative remedies is required before a plaintiff can bring an ERISA action in federal court to recover benefits under a plan"). Consequently, plan participants are not able to exercise their § 502(a)(1)(B) right to bring a civil action in court until they have gone through what has now become a lengthy, costly, and contentious process of exhausting their pre-litigation review appeal.

3. The Deferential Standard Of Review The Court Has Permitted In Benefit Denial Cases Is Highly Prized By Plan Administrators Because It Precludes Participants From Obtaining Relief In Court Without First Establishing, Through The Review Procedure's Record, That The Plan Administrator's Denial Of Benefits Was Arbitrary And Capricious.

Even after plan participants have exhausted the § 503 pre-litigation review procedures, the standard of judicial review established by the Court in *Firestone,* 489 U.S. 101, significantly reduces the circumstances under which plan participants are able to achieve relief in court under § 502(a)(1)(B). Because "ERISA does not set out the appropriate standard of review for actions under [§ 502(a)(1)(B)] challenging benefit eligibility determinations," *id.* at 109, the Court held that "a denial of benefits challenged under [§ 502(a)(1)(B)] is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Id.* at 115. In cases where benefit plans do provide the administrator with discretionary authority, courts are compelled to review decisions of the administrator under an arbitrary and capricious standard. *See Metro. Life Ins. Co. v. Glenn,* 128 S. Ct. 2343 (2008).

The consequence of *Firestone*'s standard of review is that plan sponsors and insurers merely need to

incorporate discretionary clauses in their plan or policy language to avoid *de novo* judicial review of their benefit denials. This practice has become widespread. *See also* Langbein, *Unum/Provident Scandal* at 1324. Consequently, rather than being entitled to judicial review of benefit denials under § 502(a)(1)(B), participants are limited to a deferential review of a record developed through pre-litigation plan review procedures, the creation of which pits skilled claims professionals against ordinary plan participants who have never participated in such a review proceeding, and probably never will do so again.

This disparity in skill and sophistication between the parties to the pre-litigation plan review procedures is exacerbated by the fact that many participants do not retain attorneys during these proceedings, not realizing that, more likely than not, their cases are won or lost at this stage. Indeed, even the district courts have realized that many participants do not understand these proceedings. *Cf. Herzberger v. Standard Ins. Co.*, 205 F.3d 327 (7th Cir. 2000) (language granting discretion to plan administrator must be clear and unambiguous so participants will understand their restricted coverage). Furthermore, because of the complexity of ERISA itself, the rules enforcing the statute, and an extensive web of judicial precedent implementing the statute, most individuals do not understand the significance of judicial deference to a plan administrator's decision nor do they realize that such discretion essentially means that the courts will not review their claims anew. *See Brigham v.*

Sun Life of Can., 317 F.3d 72 (1st Cir. 2003) (("[I]t seems counterintuitive that a paraplegic suffering serious muscle strain and pain, severely limited in his bodily functions, would not be deemed totally disabled. . . . [T]he undisputed facts of record do not permit us to find that Sun Life acted in an arbitrary or capricious manner in terminating appellant Brigham's benefits.").

The end result is that the ability of the vast majority of plan participants to achieve relief in courts under § 502(a)(1)(B) is predetermined by the time the plan participant has retained counsel and has an adequate understanding of the implications of the plan's pre-litigation review procedures.

4. Circuit Precedent Does Not Permit the Award Of Attorneys' Fees For Legal Work Performed During the Pre-litigation Review Procedures.

Even when plan participants understand the importance of finding knowledgeable legal representation during the plan's pre-litigation review procedures, their ability to obtain effective representation, and thus the ability to recover improperly denied benefits, is further limited by the fact that five circuits have concluded that the § 502(g)(1) attorneys' fees are not available for work performed during the plan's pre-litigation review procedures. This is true both for cases in which participants are successful, with the assistance of attorneys, in the review proceedings, *see, e.g.*, *Anderson v. Procter & Gamble Co.*, 220 F.3d 449,

452-56 (6th Cir. 2000)(collecting cases up to date of decision); and those in which, with the assistance of attorneys they unsuccessfully exhaust such required proceedings before filing suit. *See, e.g., Parke.*, 368 F.3d at 1010; *Peterson v. Cont'l Cas. Co.*, 282 F.3d 112, 118-21 (2d Cir. 2002); *Rego v. Westvaco Corp.*, 319 F.3d 140, 149-50 (4th Cir. 2003); *Cann v. Carpenters' Pension Trust Fund*, 989 F.2d 313, 315-17 (9th Cir. 1993), These decisions were based on the rationale that "the term 'any action' in [§ 502(g)(1)] does not extend to pre-litigation administrative proceedings." *Parke*, 368 F.3d at 1010.

Consequently, in the common scenario where a plan uses discretionary language, thus triggering *Firestone*'s highly deferential standard of review, a plan participant will be denied consideration for attorneys' fees for work during the very phase of the plan's pre-litigation review procedures, despite the fact that such procedures ultimately will determine if she will receive benefits, whether such receipt is through success in those procedures or through the development of the written record which will be the sole basis of judicial review under *Firestone*.

5. Upon A Determination That A Plan Administrator's Denial Of Benefits Was Arbitrary And Capricious, The Remedy Provided By Courts Frequently Is Remand To The Plan Administrator.

Even if a plan participant succeeds in establishing that his benefits were denied in an arbitrary and capricious manner, many courts choose to remand the claim to the plan administrator for a complete redetermination rather than provide a substantive remedy of an award of benefits. As the First Circuit has noted, "despite the fact that [§ 502(a)(1)(B)] . . . does not explicitly authorize administrative remand as a remedy . . . , numerous decisions by the Court and others have ordered, or approved in theory, remand to the administrator where arbitrariness is found in the course of [§ 502(a)(1)(B)] review . . . and we have seen none holding that remand is impermissible." *Buffonge*, 426 F.3d at 31 (citing *Cook v. Liberty Life Assur. Co. of Boston*, 320 F.3d 11, 24 (1st 2003); *Quinn v. Blue Cross & Blue Shield Ass'n*, 161 F.3d 472, 477 (7th Cir. 1998).

Some courts have recognized that the "variety of situations is so great" in ERISA cases that, after finding that the plan administrator's denial of benefits is arbitrary and capricious, the district court must have "considerable discretion" to craft an appropriate remedy, depending on the "facts and the equities." *See Buffonge*, 426 F.3d at 31; *accord*,

Elliott v. Metro. Life Ins. Co., 473 F.3d 613, 621-22 (6th Cir. 2006).

Other courts have attempted to establish bright line rules concerning when remand is appropriate. These courts generally remanded to the plan administrator to correct procedural defects where the plan administrator, who has discretion to apply the plan language, acts in an arbitrary and capricious manner by misconstruing the plan, failing to make adequate findings of fact, or failing to explain its grounds for decision. *See, e.g.*, *Saffle v. Sierra Pac. Power Co. Bargaining Unit Long Term Disability Income Plan*, 85 F.3d 455 (9th Cir. 1996) ("[R]emand for reevaluation of the merits of a claim is the correct course to follow when an ERISA plan administrator, with discretion to apply a plan, has misconstrued the Plan and applied a wrong standard to a benefits determination."); *Caldwell v. Life Ins. Co. of N. Am.*, 287 F.3d 1276, 1288 (10th Cir. 2002) ("The remedy when an ERISA administrator fails to make adequate findings or to explain adequately the grounds of her decision is to remand the case to the administrator for further findings or explanation."). *See also Gallo v. Amoco Corp.*, 102 F.3d 918, 923 (7th Cir. 1996); *Counts v. Am. Gen. Life & Accident Ins. Co.*, 111 F.3d 105, 108 (11th Cir. 1997); *Weaver v. Phoenix Home Life Mut. Ins. Co.*, 990 F.2d 154, 159 (4th Cir. 1993); *Buffonge*, 426 F.3d at 31 (1st Cir. 2005).

Courts tend to grant reinstatement of benefits as a remedy *only* where the denial of benefits was unreasonable on the face of the record or there is

another substantive violation of ERISA. *See, e.g., Zervos v. Verizon New York, Inc.*, 277 F.3d 635, 648 (2d Cir. 2002) ("[A] remand of an ERISA action seeking benefits is inappropriate "where the difficulty is not that the administrative record was incomplete but that a denial of benefits based on the record was unreasonable." (quoting *Zuckerbrod v. Phoenix Mut. Life Ins. Co.*, 78 F.3d 46, 51 n. 4 (2d Cir. 1996)); *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1163 (9th Cir. 2001)("[R]etroactive reinstatement of benefits is appropriate in ERISA cases where, as here, 'but for [the insurer's] arbitrary and capricious conduct, [the insured] would have continued to receive the benefits' or where 'there [was] no evidence in the record to support a termination or denial of benefits.'" (quoting *Quinn*, 161 F.3d at 478 (7th Cir. 1998)). "In other words, a plan administrator will not get a second bite at the apple when its first decision was simply contrary to the facts." *Grosz-Salomon*, 237 F.3d at 1163.

Consequently, even when a plaintiff has satisfied *Firestone*'s highly deferential standard of review, a court likely will decide to remand to the plan administrator "unless the case is so clear cut that it would be unreasonable for the plan administrator to deny the application for benefits on any ground." *Gallo*, 102 F.3d at 923 (quoting *Weaver*, 990 F.2d at 159 (4th Cir.1993)).

C. Within The Context Of Supreme Court And Circuit Court Precedent, The Fourth Circuit's Strict "Prevailing Party" Requirement, Along With Its Corollary Denial Of Attorneys' Fees Where The Relief Granted Is A Remand, Would Effectively Eliminate The Availability Of § 502(g)(1) Attorneys' Fees For A Large Majority Of Participants In Benefit Denial Cases.

The Fourth Circuit began its analysis of a participant's eligibility for discretionary attorneys' fees under ERISA by stating that "only a prevailing party is entitled to consideration for attorneys' fees in an ERISA action." *Hardt*, 336 Fed. Appx. at 335-36 (4th Cir. 2009). The Fourth Circuit stated that *Buckhannon* required that "to be a prevailing party, a plaintiff [must] receive at least some relief on the merits of his [or her] claim." *Id.* at 335. The Fourth Circuit then added the word "only" to conclude "*only* 'enforceable judgments on the merits and court-ordered consent decrees create the material alteration of the legal relationship of the parties necessary to permit an award of attorneys' fees.'" *Id.* (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001)). The Fourth Circuit concluded that because "remand does not constitute an 'enforceable judgment[ ] on the merits," the participant was not a prevailing party. Consequently, the Fourth Circuit held that, upon a determination that an ERISA plan arbitrarily and capriciously denied benefits, the participant is not entitled to consideration for

attorneys' fees where the remedy provided is remand to the plan administrator. *Id.* at 335-36.

A decision to affirm the Fourth Circuit's strict "prevailing party" standard would render illusory the availability of § 502(g)(1) attorneys' fees for a majority of participants who successfully challenge benefit denials under § 502(a)(1)(B), even if a participant secured significant legal relief through a determination that the plan administrator's denial of benefits was arbitrary and capricious and even if she ultimately recovered her benefits. This would frustrate a critical and explicit element of the congressional enforcement mechanism. The Fourth Circuit's rule, in conjunction with the existing precedent constraining access to courts and the availability of attorneys' fees, would mean that a plan participant would be prohibited from receiving an award of attorneys' fees when challenging the appropriateness of a benefit denial except in the unlikely scenario where: (1) he has exhausted the plan's pre-litigation review procedures, without success, thus providing him with access to court; (2) he is able to establish sufficient evidence in the review procedure's written record demonstrating that his plan administrator acted arbitrarily and capriciously, thus permitting the court to grant relief under the deferential *Firestone* review standard; and (3) the denial of benefits was unreasonable on the face of the record, thus making it more likely that the remedy would be relief on the merits rather than a remand to the plan administrator. Such a result would undermine the congressional enforcement scheme by rendering the availability of attorneys'

fees so unlikely that there no longer would be realistic economic incentives to encourage attorneys to represent plaintiffs and to enable plaintiffs to bring actions to enforce their rights to challenge improper denials of plan benefits.

II. POTENTIAL AWARDS OF ATTORNEYS' FEES PERMIT PARTICIPANTS TO ENFORCE THEIR RIGHTS AND MOTIVATE PLANS TO PROPERLY PROCESS BENEFIT CLAIMS.

Affirmance of the Fourth Circuit's decision would make the availability of attorneys' fees so uncertain that it would have a chilling effect on participants' willingness and ability to bring lawsuits to vindicate their rights. This is exacerbated by the lack of extra-contractual, compensatory or punitive remedies under ERISA. *See generally Great-West Life Annuity Ins. Co.*, 534 U.S. 204. In addition, an affirmance would give plans and insurers the green light to deny benefit claims with absolutely no consequence. *See, e.g., McCauley v. First Unum Life Ins. Co.*, 551 F.3d 126 (2d Cir. 2008) (noting UNUM's history of biased claims handling and awarding the participant disability benefits thirteen years after his first application). *See also* Langbein, *Unum/Provident Scandal* at 1321.

A. Because Of The Limited Means Of Many Participants And The Relatively Modest Benefits At Issue, Barring The Awards Of Attorneys' Fees Where A Remand Is Attained Will Further Discourage Participants' Attempts To Enforce Their Rights.

If the Fourth Circuit's decision is affirmed thus requiring participants to always pay their own attorneys' fees where the plan administrator has violated ERISA, it would effectively reduce participants' ability to exercise their § 502(a)(1)(B) rights to recover improperly denied benefits. This is particularly important because most participants who pursue such claims are seeking only modest benefits. See *Tingey v. Pixley-Richards West, Inc.*, 958 F.2d 908 (9th Cir. 1992); *Marquardt v. North Am. Car Corp.*, 652 F.2d 715, 719-21 (7th Cir. 1981).

Indeed, in 2007 the average annual income from defined benefit retirement plans for persons age 65 and older was $15,229, with the median at $10,260. AARP, Public Policy Institute tabulation of U.S. Census Bureau's 2008 March Current Population Survey. The average 401(k) balance at year-end 2008 was $86,513, with the median amount of $43,700.[6] J. VanDerhei, S. Holden, & L. Alonso,

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[6] Determining the amount of an annuity that a lump sum amount can purchase illustrates how modest these 401(k) balances are. "For a 65-year old man retiring in April 2009, $100,000 would be sufficient to purchase a level, single life annuity that would pay income of $700 per month for life based on current rates." Patrick Purcell, *Retirement Savings and Household Wealth in 2007* at i (Congressional Research Service

Employee Benefits Research Inst., *401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2008* at 11, Fig. 5 (EBRI ISSUE BRIEF NO. 335 Oct. 2009), *available at* http://www.ebri.org/publications/ib/index.cfm?fa=ibdisp&content_id=4378.

Because a number of factors affect the calculation of private disability income benefit amounts, such as pre-disability income, income replacement ratio, and offsets from other income sources such as Social Security disability payments, there is little data on the average or median amounts of disability benefits that claimants typically receive. However, employer-sponsored disability plans typical replace sixty percent (60%) of pre-disability income. AHIP, *Disability Insurance: A Missing Piece in the Financial Security Puzzle* at 27, Figure 4.1 (Oct. 2004), *available at* http://www.ahipresearch.org/PDFs/27_AHIPDIChartBook.pdf. If one takes the median weekly earnings of men older than age 25 who work full-time in 2008, ($857), *see* Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, Table 37 (last modified Dec. 4, 2009), *available at* http://www.bls.gov/cps/cpsaat37.pdf, multiply by 52 to obtain the median annual earnings, and then multiply by the typical replacement ratio of 60%, the typical annual long term disability benefit would be calculated as approximately $26,738.40, prior to other offsets. *E.g.*, JA 98a-99a (here Reliance offset Ms. Hardt's

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Apr. 8, 2009). All things being equal except gender, that same amount would purchase a $650 per month annuity for a woman due to women's longer life expectancy. *Id.*

disability benefits by her Social Security disability benefits).

Consequently, benefit amounts are relatively small as compared with the potential cost of litigation, thus effectively precluding the use of contingency fee agreements. The modest benefits at issue also indicate that the majority of participants are likely to have limited assets, placing a practical constraint on their ability to pay their own fees and costs, thus deterring many meritorious claims.[7] Indeed, if attorneys' fees are not awarded and the participant has to finance the litigation herself, she could actually be worse off in successfully exercising her § 502(a)(1)(B) rights than she was without the benefits.

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[7] For persons over the age of 55, the 2008 median income is $23,165, with the mean at $35,129. For persons over age 65, the 2008 median income is $18,068, with the mean at $27,886. EBRI Databook on Employee Benefits, *Sources of Income for Persons Age 55 and Over*, Table 7.2 (Updated Oct. 2009), *available at* http://ebri.org/publications/books/index.cfm?fa=databook. The average Social Security benefit for a retired worker currently in pay status is $13,968 annually. Social Security Administration, Fact Sheet on OASDI (Jan. 6, 2010), *available at* http://www.socialsecurity.gov/OACT/FACTS/index.html.

B. Absent The Availability of Attorneys' Fees, Participants Will Have Even Greater Difficulty Obtaining The Assistance Of Knowledgeable Attorneys.

Even now participants have a difficult time finding knowledgeable attorneys to handle ERISA benefit claims, partly because the practice is not at all lucrative.[8] The ERISA bar representing individuals is extremely small. For example, 852 attorneys are members the Employee Benefit Committee of the Section of Labor and Employment Law of the American Bar Association; of those, only 101 classify themselves as representing Employee-Plaintiffs, or approximately less than twelve percent (12%) of the total membership. Illustrative of the small number of attorneys representing employees are the registration figures at the 2010 Mid-Winter Meeting of this Committee. Two hundred twenty-six (226) persons were on the registration list, with twenty-two (22) persons registered as representing Employees/Plaintiffs, or slightly less than ten percent (10%) of the registrants. *See* Employee

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[8] The Department of Labor does not have authority to act as a plaintiff in benefit claim denials, *see* ERISA § 502(a)(1), and hence does not focus on benefit claims in its enforcement agenda. *See* ERISA Enforcement, National Enforcement Project, *available at* http://www.dol.gov/ebsa/erisa_enforcement.html, discussing protection of employer-sponsored plan assets. In addition, the Department of Labor does not have sufficient resources to act as counsel in benefit claim denials. *See* Department of Labor, PWBA, *Task Force on Assistance to the Public* (1992). Thus, it is imperative that there be a vibrant ERISA plaintiffs' bar to assist participants to obtain benefits to which they are entitled.

Benefit Committee of the Section of Labor and Employment Law of the American Bar Association, *available at* http://www.abanet.org/dch/committee.cfm?com=LL103000. Finally, only 150 attorneys of NELA's membership (or five percent (5%) consider themselves ERISA practitioners.

Because most plan participants have limited means, and thus are unable to retain a qualified attorney, and because the benefits at issue are typically relatively modest, thus rendering unfeasible the use of contingency fees agreements, affirmance of the Fourth Circuit's decision will dissuade the extremely limited number of knowledgeable attorneys from representing participants in the lengthy and contentious process of pursuing a benefits claim through each step necessary to eventually gain consideration for a reward of fees. *See generally* Bertino, *The Need for a Mandatory Award* at 884-86. Therefore, by affirming the Fourth Circuit's decision, the Court would be denying access to a system that is intended to be self-enforcing.

C. Awards Of Attorneys' Fees May Act As A Deterrent To Improper Processing Of Benefit Claims.

Awards of attorneys' fees also act as one of the only available mechanisms to deter arbitrary and capricious actions. This is especially true in instances where a plan or an insurer has consistently misused the benefit claim procedures. *See, e.g., McCauley*, 551 F.3d 126 (citing Unum's

history of biased claims administration); *Frederich v. Intel*, 181 F.3d 1105 (9th Cir. 1999) (finding claimant was not provided any notice of the appeal procedures and that the plan administrator failed to follow its own pre-litigation procedures, to provide medical reports to claimant, and to permit claimant to submit evidence). Plan administrators are more likely to comply with ERISA if they face a realistic risk of being assessed the participants' attorneys' fees along with paying their own attorneys. This deterrent effect benefits not only the participants but also the courts by eliminating unnecessary litigation and encouraging settlement. *E.g.*, *Slupinski v. First Unum Life Ins. Co.*, 554 F.3d 38, 48 (2d Cir. 2009) (awarding attorneys' fees may have a deterrent effect on failure to pay benefits due to pain); *Nat'l Cos. Health Benefit Plan v. St. Joseph's Hosp., Inc.*, 929 F.2d 1558, 1675 (11th Cir.1991), *abrogated on other grounds, Geissal v. Moore Medical Corp.*, 524 U.S. 74 (1998)(in ERISA cases, "the deterrent value of an award of attorneys' fee is high" because the plan "would only be liable for what it should have covered before this litigation commenced. With nothing to lose but their own litigation costs, other ERISA-plan sponsors might find it worthwhile to force underfinanced beneficiaries to sue them to gain their benefits or accept undervalued settlements.").

Finally, because ERISA is the exclusive mechanism available to plan participants to recover improperly denied benefits, *see Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), and because there are

no compensatory, punitive or extra-contractual damages permitted under ERISA, regardless of the circumstances including bad faith claims processing, *see generally Great-West Life Annuity Ins. Co.*, 534 U.S. 204; *Mertens*, 508 U.S. 248; *Russell,* 473 U.S. at 144, the award of attorneys' fees is one of the few available tools that judges have to deter bad actors. *See, e.g., Anderson v. Unum Life Ins. Co. of Am.*, 2007 WL 604728, *6-*7 (M.D. Ala. 2007) (recognizing that with no punitive or extra-contractual damages available under ERISA insurers have little to lose if they deny benefits).

CONCLUSION

For the foregoing reasons, AARP urges the Court to reverse the decision of the Court of Appeals.

Respectfully submitted,

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March 2010

AMICUS CURIAE BRIEF

No. 09-448

In The Supreme Court of the United States

BRIDGET HARDT,

Petitioner,

v.

RELIANCE STANDARD LIFE INSURANCE COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF DRI – THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Amicus will address the following question:

> Whether ERISA, 29 U.S.C. §1132(g)(1) provides a district court discretion to award attorney's fees to a party who has not achieved "some success on the merits."

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INTEREST OF THE *AMICUS CURIAE*[1]

DRI – The Voice of the Defense Bar respectfully submits this brief as *amicus curiae* in support of respondent.

DRI – The Voice of the Defense Bar is an international organization that includes more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the availability, skills, and effectiveness of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys, their clients, and the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient. To promote these objectives, DRI participates as *amicus curiae* in cases, such as this one, that raise issues of fundamental import to its members, their clients, and the judicial system.

Issues arising under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §1001, *et seq.* ("ERISA") directly impact members of

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[1] Pursuant to Supreme Court Rule 37.3(a), the parties have consented to the filing of this Brief *amicus curiae*. Respondent's letter of consent was filed with the Clerk of this Court on February 24, 2010. Petitioner's letter of consent was filed with the Clerk of this Court on February 25, 2010. Pursuant to Supreme Court Rule 37 6, *amicus* states that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amicus*, made a monetary contribution for the preparation or submission of this brief

DRI and especially members of the DRI Life, Health & Disability Committee. This Committee sponsors an annual Life, Health, Disability, and ERISA seminar that regularly draws 450-500 house counsel and outside counsel who represent virtually all of the major life, health, and disability insurance carriers in hundreds of litigation matters pending in state and federal courts throughout the United States. Most of these cases are governed by ERISA. Disputes over attorney's fees are common in such cases. Thus, the standard by which courts may award such fees is a crucial issue not only to DRI members but also to their clients who are defendants in ERISA-governed cases.

The brief of respondent provides compelling reasons to affirm the Fourth Circuit judgment. The purpose of this brief is to provide additional background information to demonstrate that both the five factor test currently applied by the lower courts as well as the proposal to eliminate any requirement that a fee petitioner achieve some success on the merits, are inconsistent with congressional intent in enacting the fee-shifting provision of ERISA.

SUMMARY OF ARGUMENT

ERISA is a collection of compromises resulting in the type of balanced regulation that is necessary in a voluntary employee benefit system. This balance is reflected in ERISA's civil enforcement scheme.

ERISA's civil enforcement provisions limit certain remedies that might otherwise be available under state law to the relatively small group of plan participants who happen to be plaintiffs in lawsuits. The trade-off is that litigation and other administrative costs are reduced in order to benefit the larger class of participants whose employers are then able to offer benefit programs in the first place. One part of this balance is ERISA's fee-shifting provision, 29 U.S.C. §1132(g)(1) which makes attorney's fees awards available, not just to successful plaintiffs, but to "either party."

The balance intended by Congress has not been applied in practice. The factors that make up the five factor test commonly used by the lower courts to evaluate petitions for attorney's fees, is heavily skewed in favor of successful plaintiffs and against successful defendants. Some circuits have even gone so far as to apply a presumption in favor of successful plaintiffs or, conversely, to hold that successful defendants will not recover attorney's fees except in egregious circumstances. Thus, even before one considers whether ERISA's fee-shifting statute requires at least some success on the merits, there is already an imbalance in the application of that fee-shifting provision.

Elimination of a requirement for some success on the merits would only exacerbate this imbalance. Given the five factor test and its built-in bias in favor of plaintiffs, elimination of a standard that requires

some success on the merits would not result in more attorney's fees awards to defendants. At the same time, it would harm defendants because it would force them to incur substantial additional costs defending fee petitions even in cases where defendants are successful. Indeed, elimination of a requirement for some success on the merits would give plaintiffs nothing to lose by filing a fee petition, especially in cases where they are unsuccessful in recovering disputed benefits. This will lead to substantial "secondary litigation" over attorney's fees and increase litigation costs accordingly. This scenario is not what Congress intended when it provided for the award of attorney's fees to "either party."

It is also time to do away with the five factor test. By design and application, the test favors plaintiffs and disfavors defendants. It destroys the regulatory balance that Congress sought to achieve when it enacted ERISA. The standard proposed by respondent better reflects that balance and puts successful defendants at the same starting point as successful plaintiffs when applying for an award of attorney's fees under ERISA.

ARGUMENT

A. CONGRESS' DECISION TO MAKE AWARDS OF ATTORNEY'S FEES AVAILABLE TO "EITHER PARTY" WAS PART OF ITS INTENT TO CREATE A BALANCED REGULATORY SCHEME FOR EMPLOYEE BENEFIT PROGRAMS.

At least until the recent enactment of health care legislation, employee benefits have not been mandated by federal law. Non-health care benefits such as pension, disability, life insurance, and other benefits are still voluntary. That means the availability of these benefits is left largely to employers who deem it a good business practice or who with more altruistic motives, determine that it is appropriate to provide such benefits to their employees.

Non-health care benefits (i.e., "voluntary" benefits) are not insubstantial. For example, according to the U.S. Bureau of Labor Statistics, as of March 2009, 73% of private industry full-time workers had access to life insurance plans through their employers and 96% of those workers participated in their employer-sponsored plans. National Compensation Survey: Employee Benefits in the United States, March 2009, available at http://www.bls.gov/ncs/ebs/benefits/2009/ebbl0044.pdf (Table 16). During the same period, 41% of full-time workers had access to long term disability plans and 96% of those workers participated in their employer-sponsored long term disability plans. *Id.* Finally, 76% of full-time private industry workers had access to some type of retirement program (e.g., a

defined benefit program, defined contribution program, or both) and 80% of those workers participated in their employer-sponsored retirement plan. *Id.* at Table 2. The high percentages of employees who participate in these benefit programs is strong evidence of the substantial value that such benefits offer to American workers.

Balanced regulation is crucial to a voluntary benefit system. In the context of litigation disputes, while broad damages remedies may favor participants who happen to be plaintiffs in lawsuits, the availability of such damages would harm the large class of participants who seek to be covered under such plans because added litigation costs would discourage employers from offering benefit programs in the first place. The arguments of petitioner and her *amici* focus solely on the rights of individual participants who are plaintiffs in lawsuits. Petitioner and her *amici* ignore the interests of the larger class of participants who will lose coverage if increased litigation costs force employers not to offer benefit programs.

Unlike petitioner and her *amici*, Congress could not afford to ignore one side or the other when it enacted ERISA. This inevitably led to compromises as Congress sought to achieve the necessary balance of protecting individual plaintiffs and also protecting the larger class of covered participants. In interpreting and applying ERISA, this Court has cautioned that courts must be cognizant of this balance:

> [C]ourts may have to take account of competing congressional purposes, such as Congress' desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place.

Varity Corporation v. Howe, 516 U.S. 489, 497 (1996).

In the litigation context, Congress achieved this balance through several mechanisms. First, Congress enacted a broad preemption provision, establishing that all state laws that "relate to" employee benefit plans, including state law causes of action, are superseded by federal law, thereby establishing a uniform national regulatory system for employee benefit programs. 29 U.S.C. §1144(a); *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 45-46 (1987). Congress also established a detailed civil enforcement scheme that this Court has repeatedly held is the exclusive means by which participants may obtain relief under ERISA plans. *Pilot Life,* 481 U.S. at 52; *Ingersoll-Rand v. McClendon,* 498 U.S. 133, 143-44 (1990); *Aetna Health Ins. v. Davila,* 542 U.S. 200, 218 (2004). Finally, again with the purpose of achieving the necessary regulatory balance and as part of ERISA's civil enforcement scheme, Congress enacted a fee-shifting provision that departed from prior law (as well as from earlier versions of ERISA) that allowed attorney's fees to be awarded only to successful

participants and instead opted for language that permitted awards to "either party."

In the context of ERISA's civil enforcement scheme, "either party" can mean several types of persons or entities. Potential plaintiffs include "a participant, beneficiary, or fiduciary." 29 U.S.C. §1132(g)(1). A participant is a covered employee. 29 U.S.C. §1002(7). A beneficiary is a person who is designated by a participant or by the terms of a plan to recover benefits under the plan. *Id.* at §1132(8). A fiduciary is a person or entity who has discretionary authority under a plan or who controls plan assets. *Id.* at §1132(21). A benefit plan may also be a plaintiff where a participant, beneficiary, or fiduciary brings an action under §1132(a)(2) on behalf of a plan. *See, e.g., LaRue v. DeWolff, Boberg & Assoc.*, 552 U.S. 248, 253 (2008) (suits for breach of fiduciary duty under §1132(a)(2) must be brought on behalf of a benefit plan).

Likewise, potential defendants can refer to several types of persons or entities. A benefit plan can be a defendant. *See, e.g.*, 29 U.S.C. §1132(d)(2) ("Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter."); *Everhart v. Allmerica Financial Life Ins. Co.*, 275 F.3d 751 (9th Cir. 2001) (a claim for ERISA benefits can only be brought against a plan).

Plan sponsors and administrators, or claim administrators (including insurers and non-insurer third party administrators) can also be defendants. This case is an example. Finally, in breach of fiduciary duty actions, a defendant must be a fiduciary, which can be an entity or a person, or both. *See, e.g., Baker v. Kingsley,* 387 F.3d 649 (7th Cir. 2004). Thus, when Congress specified that awards of attorney's fees could be made in favor of "either party," it was not just referring to individual plaintiffs and insurer defendants, but to multiple types of entities in multiple contexts.

B. IN PRACTICE, BY APPLYING THE PREVAILING FIVE FACTOR TEST, THE LOWER COURTS HAVE NOT MADE ATTORNEY'S FEES AWARDS AVAILABLE TO "EITHER PARTY."

Unfortunately, the balance intended by Congress when it made attorney's fee awards available to "either party" has not occurred in practice. This is largely due to the application of the five factor test that dominates consideration of attorney's fees petitions in the lower courts. The five factors, as created by the Tenth Circuit in *Eaves v. Penn,* 587 F.2d 453, 465 (10th Cir. 1978), are: (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing party to satisfy a fee award; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting

fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions. *Id.* at 465.

The Seventh Circuit has long been the most vocal critic of the skewed application of the five factor test when applied to defendants. In *Marquardt v. North American Car Corp.*, 652 F.2d 715 (7th Cir. 1981), the court reviewed a denial of a defendant's application for attorney's fees and took the opportunity to explain why the five factor test was not designed for evaluation of defendants' fee claims:

- Factors 1 and 5 (success on the merits and "culpability"): These factors focus on violations of ERISA, which would only apply to defendants because while a plaintiff might be in error in bringing a case, a plaintiff would rarely be "culpable."

- Factor 2 (ability to pay): This factor would apply far more often to an individual plaintiff than to a defendant, particularly a defendant employer or insurer.

- Factor 3 (deterrence): This factor would rarely support a fee award against an individual plaintiff unless a plaintiff's claim was utterly frivolous.

- Factor 4 (benefitting all participants in an ERISA plan or resolution of a significant legal issue): This factor might support an award of attorney's fees to a defendant in some cases where the defendant establishes an interpretation that

> clarifies the law or benefits participants, but "in general, the fourth factor is significant in determining the benefits conferred in a suit brought by ERISA plaintiffs, rather than the benefits of dismissing a meritless ERISA suit."

Id. at 720-21. The Seventh Circuit summarized its conclusions about the five factor test as follows:

> We emphasize . . . that refusal to award attorney's fees and costs to ERISA defendants, even 'prevailing' defendants, would rarely constitute an abuse of discretion. Although the five factors used as guidelines above do not explicitly differentiate between plaintiffs and defendants, consideration of these factors will seldom dictate an assessment of attorneys' fees against ERISA plaintiffs.

Id. at 719-20.

Three years later, the Seventh Circuit again addressed a defendant's petition for attorney's fees under ERISA in *Bittner v. Sadoff & Rudoy Industries,* 728 F.2d 820 (7th Cir. 1984). The court again observed that the five factor test "is oriented toward the case where the plaintiff rather than the defendant prevails and seeks an award of attorney's fees." *Id.* at 829. The court applied a "substantially justified" test to the defendant's request for fees whereby a court measures whether the losing party's position was "substantially justified" to determine whether to award attorney's fees. *Id.* However, even though the five factor test is admittedly a test biased toward

plaintiffs, the court still applied the five factor test to determine if "special circumstances" existed to deny the defendant's petition for attorney's fees. *Id.* at 830. *See also Elliot v. Fortis Benefits Ins. Co.*, 337 F.3d 1138, 1148 (9th Cir. 2003) (the five factor test should be "liberally construed" in favor of successful plaintiffs).

This is not to say that defendants, whomever they may be, have never obtained attorney's fees under ERISA. However, with the prevailing five factor test already working against them, defendants' fee awards are so rare that most defendants will not even bother to incur the expense of a fee petition even when they win on every substantive issue. To make matters worse, some circuits apply at least a "modest presumption" in favor of awarding attorney's fees to prevailing plaintiffs. *See, e.g., Elliot v. Fortis Benefits Ins. Co., supra* (plaintiffs are typically awarded attorney's fees if successful, absent special circumstances); *Hess v. Hartford Life & Acc. Ins. Co.*, 274 F.3d 456, 463 (7th Cir. 2001) (modest presumption in favor of successful plaintiff). Other circuits have held that as a general rule, attorney's fees will not be awarded in favor of a successful defendant. *See, e.g., Celardo v. Greater New York Automobile Dealers Health & Welfare Trust*, 318 F.3d 142, 147 (2d Cir. 2003); *Marquardt v. North American Car Corp., supra*. Still others have held that there is no presumption in favor of a prevailing plaintiff, although these circuits still apply the five factor test. *See, e.g., Moon v. UnumProvident Corp.*, 461 F.3d 639, 642 (6th

Cir. 2006); *Martin v. Arkansas Blue Cross and Blue Shield,* 299 F.3d 966, 971-72 (8th Cir. 2002). In practice, and in spite of Congress' requirement that attorney's fees be available to "either party," defendants' chances of recovering attorney's fees are very low and are generally limited to situations where the plaintiff's claim is deemed frivolous and/or the conduct of plaintiff's counsel is egregious. *See, e.g., Moore v. Lafayette Life Ins. Co.,* 458 F.3d 416, 445-47 (6th Cir. 2006) (award of 50% of defendant's attorney's fees is affirmed where plaintiff and his attorney submitted "unreliable" briefs and pursued frivolous claims; sanctions also awarded due to actions of counsel under 28 U.S.C. §1927); *Stark v. PPM America, Inc.,* 354 F.3d 666, 674 (7th Cir. 2004) (fees awarded to defendant where plaintiff's position was not "substantially justified").

C. ELIMINATION OF A REQUIREMENT THAT A PARTY ACHIEVE SOME SUCCESS ON THE MERITS WOULD ONLY EXACERBATE THE UNBALANCED APPLICATION OF ERISA'S FEE-SHIFTING PROVISION, CONTRARY TO THE INTENT OF CONGRESS.

The point of this background information is twofold. First, it demonstrates that the balanced regulation that Congress sought to achieve in ERISA generally, and in the fee-shifting provision specifically, has not been carried out by the courts. The five factor test is most to blame for this failing because, as the Seventh Circuit pointed out nearly thirty years

ago, that test is geared toward awarding fees to plaintiffs, not defendants. There is no generally accepted standard applicable to defendants' fee claims except for those jurisdictions where courts have expressed that defendants simply will not be awarded fees absent extreme circumstances. Second, when applied to this Court's consideration of a prevailing party standard for attorney's fees awards under ERISA, it should be understood that elimination of such a requirement that there be some success on the merits will only increase the chances for plaintiffs to recover fees, will result in greater exposure for defendants even when they prevail on the substantive issues in a case, and will not provide defendants with any greater opportunity to recover fees because, as a practical matter, the deck is already stacked against defendants despite Congress' intent that fees should be awarded to "either party."

When petitioner and her *amici* advocate for elimination of a prevailing party standard, they are really saying that *plaintiffs* should not have to prevail in order to recover attorney's fees under ERISA. Defendants, whether or not they are successful, are already subjected to a much higher hurdle for recovering attorney's fees. Any ruling that eliminates a prevailing party standard will not restore the balance intended by Congress nor would it help defendants one bit.

Petitioner's *amici* are wrong when they suggest that a prevailing party requirement gives defendants a "green light" to deny benefits with no consequences.

Given the current status of attorney's fees awards under ERISA, a successful plaintiff has a much higher likelihood of recovering attorney's fees than a successful defendant. Defendants who are evaluating the merits of a claim for benefits are well aware of this fact. In other words, defendants who deny claims know that if the claimant brings an action in court and is successful, it is more likely that the plaintiff will recover her fees than that the defendant will recover its fees if it is successful. Elimination of a standard that requires some success on the merits will not change this fact or make it more likely that defendants will pay claims for fear of facing a fee petition, unless petitioner and her *amici* are suggesting that defendants should pay claims that are not payable under the terms of the ERISA plan simply to avoid a fee petition by a losing plaintiff, for that would require defendants to violate their fiduciary duties to pay claims only when the terms of the plan require payment. 29 U.S.C. §1104 ("a fiduciary shall discharge his duties . . . in accordance with the documents and instruments governing the plan"). *See also Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. 134, 142 (1985) (ERISA fiduciary duties are primarily concerned with protecting the integrity of the plan); *Barnhart v. Unum Life Insurance Company of America,* 179 F.3d 583, 589 (8th Cir. 1999) ("A company failing to conduct proper inquiries into claims for benefits breaches its duty to all claimants as a fiduciary of the benefit funds when it grants claims to unqualified claimants.").

Petitioner's *amici* also ignore the impact on defendants of the elimination of a requirement for some success on the merits. Petitioner and her *amici* concede that the absence of such a requirement means that a plaintiff who loses can still recover fees, although they suggest that this is not likely to happen very often. That is beside the point. The point is that under petitioner's theory, even if a defendant incurs substantial attorney's fees and costs to successfully defend an ERISA dispute, it must still face the prospect of incurring even more attorney's fees and costs to defend against a fee petition filed by the losing plaintiff even though, under the current application of ERISA's fee-shifting provision, the defendant has little hope of recovering its own fees and costs. Indeed, in many cases, particularly where attorney's fees exceed the amount of benefits at issue, a losing plaintiff will have little or nothing to lose by filing such a petition. There is no risk or deterrent because the plaintiff will know that even if her petition for attorney's fees is denied, it is unlikely that she will be required to pay the defendant's attorney's fees and costs.

This unbalanced system – where plaintiffs and defendants are subjected to different standards such that plaintiffs can routinely recover attorney's fees and defendants can only rarely recover fees, at least absent proof of egregious conduct – was not what Congress intended when it provided that attorney's fees and costs should be available to "either party." This system also works against Congress' broader

goal of establishing a balanced regulatory regime to encourage the establishment of employee benefit programs because the added costs of defending against these fee petitions (and the possibility of having to pay fees even in cases where a plaintiff loses) ultimately falls back on the sponsoring employers and provides yet another obstacle for employers who seek to establish such plans.

D. THE FIVE FACTOR TEST SHOULD BE ELIMINATED AND REPLACED BY A MORE BALANCED TEST.

This case also presents a prime opportunity to discard the five factor test. As discussed in respondent's brief, this test was created by the Tenth Circuit out of whole cloth in *Eaves v. Penn, supra.* By design and application, it is contrary to the balance that Congress sought by making attorney's fee awards available to "either party." Maybe the test proposed by respondent will still result in practice with plaintiffs recovering their fees more often than defendants, but at least the test proposed by respondent starts plaintiffs and defendants on the same footing. It is certainly a better reflection of congressional intent under ERISA.

CONCLUSION

For the reasons stated herein and in respondent's brief, the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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March 31, 2010

AMICUS CURIAE BRIEF

No. 09-448

In the Supreme Court of the United States

BRIDGET HARDT,

Petitioner,

v.

RELIANCE STANDARD LIFE INSURANCE COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF UNITED POLICYHOLDERS, AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICUS CURIAE[1]

United Policyholders ("UPH") is a single-issue, non-profit organization founded in 1991. The organization's mission is to educate the public, legislators and courts on insurance issues and consumer rights and to help policyholders secure fair and prompt claim settlements, including policyholders who are participants in employee benefit plans governed by ERISA, 29 U.S.C. § 1001 *et seq.* UPH is a recognized charity with tax exempt status under Internal Revenue Code § 501(c)(3), funded by donations and grants from individuals, businesses and foundations. An average of 20,000 monthly visitors read articles and tips at UPH's website, www.unitedpolicyholders.org.

UPH protects the interests of and presents the positions of policyholders through participation as *amicus curiae* in insurance-related cases throughout the country.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no person or entity other than the *amici curiae*, and their undersigned counsel made a monetary contribution to the preparation or submission of this brief. No attorney for any party authored this brief in whole or in part. Written consent to the filing of this brief has been obtained from the parties in accordance with Supreme Court rule 37.3(a). Copies of the consent letters have been filed with the Clerk.

UPH's reputation as a reliable friend of the court was enhanced when its *amicus curiae* brief was cited in this Court's opinion in *Humana v. Forsyth*, 525 U.S. 299 (1999), and its arguments were adopted by the Texas Supreme Court in *Excess Underwriters at Lloyd's, London, et al. v. Frank's Casing Crew & Rental Tools Inc.*, 2008 Tex. LEXIS 92, 51 Tex. Sup. J. (Tex. Feb. 1, 2008), as well as by the California Supreme Court in *Vandenberg v. Superior Court*, 88 Cal. Rptr.2d 366 (Cal. 1999) and in *TRB Investments, Inc. v. Fireman's Fund Ins. Co.*, 145 P.3d 472 (Cal. 2006).

Other ERISA cases in which UPH has been granted leave by the Supreme Court to participate as *amicus curiae* include: *Metro. Life Ins. Co. v. Glenn*, 554 US __, 128 S. Ct. 2343, 171 L. Ed. 2d 299 (2008); *Aetna Health, Inc. v. Juan Davila*, 542 US 200 (2004); and *Rush Prudential HMO v. Moran*, 536 US 355 (2002).

The resolution of the issue in this case is of great importance to UPH because of its potential application to millions of employees enrolled in ERISA plans.

SUMMARY OF ARGUMENT

This matter presents the question of whether attorney's fees in ERISA cases may be awarded pursuant to 29 U.S.C. § 1132(g) upon the issuance of a ruling overturning the plan administrator's denial of benefits, even if the court remands the matter to the plan administrator rather than orders the

outright payment of benefits. In addition to a split between the Circuits on this question, the ruling issued by the Fourth Circuit creates an unwarranted disparity between fee award standards in private benefits cases and public benefits cases. Fees are available in public benefit cases upon the achievement of any legal relief. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Shalala v. Schaefer*, 509 U.S. 292 (1993). Since the availability of fee awards in private ERISA benefit claims serves the same purposes as fee awards in public benefits cases, fees should be awarded in ERISA cases under the same standards. The unwarranted disparity between public and private benefits cases is even more pronounced here because, unlike fee awards made pursuant to the Equal Access to Justice Act (E.A.J.A), 28 U.S.C. § 2412, there is no "prevailing party" requirement in 29 U.S.C. § 1132(g). Further, even if there were a "prevailing party" standard in ERISA's fee-shifting statute, an order of remand is itself sufficient to justify a fee award based on how that concept is defined in the context of other fee shifting statutes; i.e., a prevailing party is one who achieves a judicially sanctioned and material change in the legal relationship between the parties. *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 604-05, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)(attorney's fee award would be proper under "prevailing party" standard where there is a court sanctioned alteration in the legal relationship of the parties). A remand order is therefore sufficient in and of itself to trigger to an award of fees pursuant to 29 U.S.C. § 1132(g).

ARGUMENT

THE ERISA FEE SHIFTING STATUTE, 29 U.S.C. § 1132(g), AUTHORIZES CONSIDERATION OF FEE AWARDS UPON THE ACHIEVEMENT OF A SIGNIFICANT CHANGE IN THE LEGAL RELATIONSHIP BETWEEN THE PARTIES EVEN IF AN OUTRIGHT AWARD OF BENEFITS HAS NOT BEEN ORDERED.

ERISA's attorney's fee provision, 29 U.S.C. § 1132(g), serves two purposes. First, it discourages frivolous claim denials by providing a disincentive or sanction that may be imposed when a court finds that a plan fiduciary unlawfully denied benefits or abused its discretion in denying a benefits claim. Second, the attorney's fee provision allows claimants to secure legal representation even when their claims are of low to moderate value, thereby helping to provide plan participants access to remedies as contemplated in ERISA's declaration of policy. *See* 29 U.S.C. § 1001(b)("It is hereby declared to be the policy of this Act to protect . . . the interests of participants in employee benefit plans and their beneficiaries, . . . by providing for appropriate remedies, sanctions, and ready access to the Federal courts.")

Based on the language of ERISA's fee-shifting

statute, 29 U.S.C. § 1132(g), which provides that the "court in its discretion may allow a reasonable attorney's fee and costs of action to either party." fees may be sought upon the issuance of a court order overturning a benefit denial, even if the court orders the plan administrator to reevaluate the claim instead of awarding benefits outright. Nonetheless, the principal rationale given for disallowing a fee application upon the issuance of a remand order is that an award of fees would be premature at that juncture since no award of benefits has been made. Cf. *Quinn v. Blue Cross and Blue Shield Ass'n*, 161 F.3d 472, 478-79 (7th Cir. 1998). The ramifications of that approach are troubling since the "premature" reasoning provides no incentive for plan administrators to approve benefits following a remand. If the worst that could happen to a plan administrator when it denies a claim for benefits is a remand for a "do-over" without the risk of incurring attorney's fees, there is no motivation to encourage the plan fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries." ERISA § 404(a), 29 U.S.C. § 1104(a). Indeed, fee awards are the only deterrent to prevent a breach of fiduciary duty since plan administrators face no risk of being subject to other penalties or awards of damages under ERISA.[2]

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[2] *See, e.g., Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985).

A district court remand to the plan administrator in cases where courts apply a deferential review standard necessarily means the district court has found the plan fiduciary guilty of abusing its discretion in denying a benefits claim. It also means the claimant has met the almost insurmountable burden of proving unlawful behavior on the part of the administrator. Fee denials following such "abuse of discretion" remands create a perverse incentive for plan insurers to once again deny the claim. It also effectively places the entire financial burden of a wrongfully-denied benefit claim on the claimant. If fees are not awarded where a claimant has proven unlawful behavior, it will result in a chilling effect upon claimants pursuing meritorious claim and the attorneys who seek to help them.

The claimants who will feel the most profound effect of fee denials are those whose disability or health insurance benefit amounts are minimal in comparison to the cost of litigating their claims. As the Seventh Circuit recently noted in *Anderson v. All Painting & Sandblasting Inc.*, 578 F.3d 512 (7th Cir. 2009), ERISA fees may be disproportionate to the recovery achieved. There, the court explained:

> Because Congress wants even small violations of certain laws to be checked through private litigation and because litigation is expensive, it is no surprise that the cost to pursue a contested claim will often exceed the amount in controversy. Tuf Racing Products, Inc. v. American Suzuki Motor Corp., 223

> F.3d 585, 592 (7th Cir. 2000). That is the whole point of fee-shifting--it allows plaintiffs to bring those types of cases because it makes no difference to an attorney whether she receives $ 20,000 for pursuing a $ 10,000 claim or $ 20,000 for pursuing a $ 100,000 claim. See id. Fee-shifting would not "discourage petty tyranny" if attorney's fees were capped or measured by the amount in controversy.

578 F.3d at 545 (citations omitted). The case before the Court is illustrative since it involved an award of a modest amount of past due benefits while future benefits remain subject to Hardt's continuing qualification for benefits under the terms of the benefit plan. Under such circumstances, an insurer such as Reliance is encouraged by a fee denial to refuse to pay benefits following a remand because the fees at issue are potentially larger than the benefits themselves. If plans were on notice that they could be required to pay fees for their unlawful behavior even if benefits were not awarded outright, it would create the incentive to decide the claim properly in the first instance. Thus, a fee award is justifiable for the identical rationale cited in *Anderson*, i.e., to "discourage petty tyranny."

After finding a plan administrator's claim determination arbitrary and capricious, outright attorney fee denials not only encourage more claim denials, they also hinder claimants' ability to secure legal counsel to litigate their claims. Few benefit

claimants who are unable to work can afford to hire an attorney on an hourly fee basis and contingency fee representation is uneconomical when the benefits claimed are modest in value. And without the potential for fee awards immediately upon a district court's conclusion that a plan insurer has acted unlawfully, an attorney in private practice would lack any incentive to represent an ERISA plan participant in a relatively modest benefits claim. Subjecting a plan fiduciary to a fee award upon a district court's finding of an abuse of discretion will incentivize lawyers to represent ERISA plan participants.[3] It will also encourage plan fiduciaries to resolve claims that should be paid and to do so prior to the filing of a complaint. Hence, this Court should reject the Fourth Circuit's approach to awarding attorney's fees in ERISA benefit claims.

Congress provided no specific guidance on fee awards in ERISA's legislative history. Nonetheless, the standards generally accepted by all circuits after the Ninth Circuit's ruling in *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446 (9th Cir. 1980), which cabin a lower court's discretion to set fees, are relevant and should be utilized in determining whether fee awards should be made when a benefit denial is overturned. A key factor among the five,[4] and one

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[3] *See Hooper v. Demco, Inc.*, 37 F.3d 287, 291 (7th Cir. 1994) (Congress gave courts discretion to award fees "to encourage aggrieved parties to seek redress under ERISA.").

[4] (1) the losing party's culpability or bad faith; (2) the losing party's ability to satisfy a fee award; (3) the

that is consistent with the argument made above, is the availability of fee awards as a deterrent against unlawful claim denials. That factor serves ERISA's broad purpose to protect the interests of plan participants and their beneficiaries (29 U.S.C. § 1001(b)), "even when small amounts are involved." *Chambless v. Masters, Mates & Pilots Pension Plan*, 815 F.2d 869, 872 (2d Cir. 1987). Cases recognizing the importance of fee awards as a deterrent include *National Cos. Health Benefit Plan v. St. Joseph's Hosp.*, 929 F.2d 1558, 1575 (11th Cir. 1991) ("With nothing to lose but their own litigation costs, other ERISA-plan sponsors might find it worthwhile to force underfinanced beneficiaries to sue them to gain their benefits or accept undervalued settlements.") and *Rivera v. Benefit Trust Life Ins. Co.*, 921 F.2d 692, 698 (7th Cir. 1991) (award of attorneys' fees warranted by deterrent effect on plan administrators and further justified by payment out of defendant's assets rather than from a funded benefit plan). Sound policy reasons therefore offer good reason to allow fee awards even if an outright award of benefits has not been made.

The circuits that have allowed fee awards when benefit denials are overturned and the claim remanded to the plan administrator have furnished a convincing rationale for doing so. For example, in *Miller v. United Welfare Fund*, 72 F.3d 1066, 1074

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deterrent effect of such an award; (4) the value of the victory to plan participants and beneficiaries, and the significance of the legal issue involved; and (5) the relative merits of the parties' positions. 634 F.2d at 453.

(2d Cir. 1995), the Second Circuit explained:

> Notwithstanding that we decline to grant benefits to Miller but rather remand the district court's determination for further consideration, an award of attorneys' fees to plaintiff is not precluded. Section 502(g)(1) contains no requirement that the party awarded attorneys' fees be the prevailing party. Cf. 29 U.S.C. § 1132(g)(2). The district court may award attorneys' fees to either party "in its discretion." Moreover, the district court may in fact determine that Miller is the prevailing party to the extent that her motion for summary judgment claimed that the Fund's denial was arbitrary and capricious. See Sansevera v. E.I. DuPont de Nemours & Co., 859 F. Supp. 106, 117 (S.D.N.Y. 1994) (granting attorneys' fees to plaintiff whose summary judgment motion was partially granted as to claim that Plan Board acted arbitrarily and capriciously in denying benefits).

The explanation offered by the Ninth Circuit reaches the same conclusion but suggests a somewhat different rationale. *Flom v. Holly Corp.*, 276 Fed. Appx. 615 (9th Cir. 2008)(non-precedential), explains that although there is no prevailing party requirement in Section 502(g), even if such a requirement were implied before fees are shifted

under ERISA, "a prevailing party is one who achieves a judicially sanctioned and material change in the legal relationship between the parties." 276 Fed.Appx. at 616 (citing *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 604-05, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). Thus, one can be a prevailing party even if the ultimate remedy sought is not necessarily achieved. The court added that a remand to a plan administrator is analogous to a remand to an administrative agency, and that such a "remand can provide the judicial imprimatur necessary for a party to become a prevailing party" for the purposes of a fee award. *Id.* Referencing the rationale behind fee awards for remands afforded by the Equal Access to Justice Act, 28 U.S.C. § 2412 (d)(1)(A), the court added:

> For example, an alien may be a prevailing party under the Equal Access to Justice Act when the court remands his case to the Board of Immigration Appeals, regardless of the fact that the court does not decide the merits of the underlying claim. Rueda-Menicucci v. I.N.S., 132 F.3d 493, 495 (9th Cir. 1997); *see also* Li v. Keisler, 505 F.3d 913, 917-18 (9th Cir. 2007); *and* Johnson v. Gonzales, 416 F.3d 205, 208-10 (3rd Cir. 2005) (joining the Ninth and Seventh Circuits in concluding that an alien who prevails on a petition for review and whose case is remanded to the BIA is a "prevailing

> party"). Similarly, when a court remands a claimant's case seeking Social Security benefits to the agency pursuant to "sentence four," the claimant is a prevailing party even though the court's only action is to remand the case. *See* Shalala v. Schaefer, 509 U.S. 292, 300-02, 113 S. Ct. 2625, 125 L. Ed. 2d 239 (1993).

276 Fed.Appx. at 616-17.

Flom is consistent with an unbroken string of Supreme Court rulings involving both public benefits and civil rights. For example, in *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983), the Court explained, "[P]laintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." The same rationale was expressed in *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992), which held a party prevails when "actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying defendant's behavior in a way that directly benefits the plaintiff." Thus, a court ruling that overturns a benefit denial and gives the claimant a renewed opportunity to secure benefits plainly transforms the plaintiff into a prevailing party.

The example of the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) ("EAJA") is particularly instructive. Under EAJA, a Social

Security disability benefit claimant who receives a remand pursuant to Sentence 4 of 42 U.S.C. § 405(g)[5] is eligible to apply for fees immediately upon the issuance of an order of remand. Although there is no provision in ERISA comparable to Sentences 4 and 6 of 42 U.S.C. § 405(g) which specifically authorize remands as a remedy,[6] a court ruling

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[5] See, *Melkonyan v. Sullivan*, 501 U.S. 89 (1991) (discussing Sentence 4 and Sentence 6 remands, the former involving a remand in conjunction with a judgment affirming, modifying, or reversing the Commissioner's decision and the latter involving a remand for consideration of new evidence without any substantive ruling as to the correctness of the Secretary's decision). An ERISA remand, as occurred in this case, resembles a Sentence 4 remand since the court overturned a benefit denial. Also see, *Perlman v. Swiss Bank Corp.*, 195 F.3d 975 (7th Cir. 1999)(explaining the finality of an ERISA remand for the purpose of appellate jurisdiction).

[6] The fact that ERISA does not contain a comparable provision authorizing federal trial courts to remand benefits cases to ERISA plan administrators is undoubtedly due to significant differences between ERISA and the Social Security Act. A remand of a Social Security disability benefit case is allowable because it connotes the outcome of a judicial review proceeding much like an appellate court review of a final judgment entered by a trial court. That is, in a Social Security benefits claim, Congress relegated adjudicatory powers to a neutral administrative law judge (ALJ), and designated the federal district court as the body to hear appeals from ALJ rulings. However, in ERISA cases, again, unlike Social

decisively determining the plan administrator has abused its discretion is comparable in nature. However, it remains important to keep in mind the profound differences between ERISA and public benefit claims,[7] and that an administrative law

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Security disability benefit claims, there is no pre-litigation hearing, nor is there an administrative law judge to whom an ERISA case can be remanded. Rather than interpreting ERISA to make the plan administrator an adjudicator and thereby raise serious constitutional issues as to whether a private party can adjudicate statutory rights (See, *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993)(potential due process violation when private party adjudicates pension withdrawal liability cured by arbitral review)), this Court should recognize that 29 U.S.C. § 1132(a)(1)(B) creates a *de novo* action that must be adjudicated to final judgment by an Article III judge under the Federal Rules of Civil Procedure as applicable to all civil actions (Fed.R.Civ.P. 1 and 2) in order to achieve an "immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937)

[7] Cf. *Luby v. Teamsters Health, Welfare, & Pension Trust Funds*, 944 F.2d 1176, 1183 (3d Cir. 1991):

> Plan administrators are not governmental agencies who are frequently granted deferential review because of their acknowledged

paradigm is inapplicable to ERISA claim adjudications. *See, e.g.*, Langbein, "Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials Under ERISA," 101 Nw.U L.Rev. 1315, 1331-33 (2007).

Nevertheless, the rationale behind the ruling in *Shalala v. Schaefer*, 509 U.S. 292, 113 S. Ct. 2625 (1993) is instructive here. *Schaefer* ruled that fee applications under EAJA are available following a remand without the need to await an outright award of benefits, finding, "No holding of this Court has ever denied prevailing party status (under 28 U.S.C. § 2112(d)(1)(B)) to a plaintiff who won a remand order pursuant to sentence four of § 105(g)." *Shalala*, 509 U.S. at 302. Thus, based on long-standing Supreme Court precedent relating to prevailing party status under fee-shifting statutes, Social Security disability benefit claimants who win remands are entitled to seek fees regardless of whether they ultimately prevail in securing an award of benefits. Given the similarity in nature of

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> expertise. Administrators may be laypersons appointed under the plan, sometimes without any legal, accounting, or other training preparing them for their responsible position, often without any experience in or understanding of the complex problems arising under ERISA, and, as this case demonstrates, little knowledge of the rules of evidence or legal procedures to assist them in factfinding.

ERISA remands, no logical ground exists to distinguish the availability of fee awards under ERISA from the well-established law relating to EAJA. Accordingly, the Fourth Circuit's finding is erroneous and must be overruled.

CONCLUSION

The determination of the Fourth Circuit must be overturned and the district court's award of fees pursuant to 29 U.S.C. § 1132(g) should be reinstated.

Respectfully submitted.

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